No. 16282

United States

Court of Appeals

for the Ninth Circuit

REXALL DRUG COMPANY, a Corporation, and ARNOLD L. LEWIS, Doing Business as Studio Cosmetics Company, Appellants,

vs.

SANDRA MAE NIHILL, a Minor, by Her Father and Guardian John Nihill, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 408, inclusive)

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—4-2-59

No. 16282

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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PHILIP L. BRADISH,
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Los Angeles 17, California,
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dba Studio Cosmetics Company.

JAMES G. ROURKE,
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LANIER, LANIER & KNOX,
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Fargo, North Dakota,

Attorneys for Appellee. [1]*

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* Page numbers appearing at bottom of page of Original Transcript of Record.

In the United States District Court for the District of the State of California, Central Division

No. 258-57 WM

SANDRA MAE NIHILL, a Minor, by Her Father and Regular Guardian, John Nihill,
Plaintiff,

vs.

REXALL DRUG COMPANY, a Corporation, Doing Business as Cara Nome Rexall, and ARNOLD L. LEWIS, Doing Business as Studio Cosmetics Company, Defendants.

COMPLAINT AND JURY DEMAND

Plaintiff for Right of Action Alleges:

I.

That she is a minor of the age of fifteen years, a resident citizen of the State of North Dakota, and brings this action through her father and regular guardian, John Nihill, a resident citizen of the State of North Dakota, duly qualified as regular guardian of the plaintiff on May 28, 1956, through the County Court of Foster County, North Dakota, and certified copy of Letters of Guardianship is attached hereto and made a part hereof, designated as Exhibit "A"; the defendant, Rexall Drug Company, is a corporation, organized and existing under the laws of the State of Delaware and doing business in the State of California under the name, Cara Nome Rexall, a fictitious name; and the de-

fendant, Arnold L. Lewis, is doing business under the name, Studio Cosmetics Company, and is presently a citizen and resident of California doing business at Los Angeles, California; that the amount involved herein is more than $3,000.00, exclusive of costs; that party plaintiff is a resident citizen of a different state from parties defendant.

II.

That defendant, Rexall Drug Company, doing business as Cara Nome Rexall, [2] was the distributor of said product in association with the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company; that Arnold L. Lewis, doing business as Studio Cosmetics Company, was the manufacturer of said product; and as such manufacturer and distributor, defendants advertised, sold and distributed said product throughout the United States and Canada, including North Dakota.

III.

That on the 5th day of February, 1955, plaintiff purchased from the Kensal Drug Company of Kensal, North Dakota, a bottle of said product of Cara Nome, which had been obtained from and through the defendants; this product, when so purchased, was sealed and was a product that had come from the factory in the state in which it was at the time of purchase; this product was immediately taken to the home of plaintiff and there opened and immediately used pursuant to directions accompanying said product; that within ten days after said use, plaintiff's hair began coming out and continued

to do so until in a short while all was gone, and she was rendered hairless on the head and has ever since been bald and will always be so disfigured.

IV.

That said product and the application thereof as aforesaid was the direct and proximate cause of the loss of hair as aforesaid by plaintiff; that defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, the manufacturer, was guilty of negligence in permitting some ingredient to be placed in said bottle that could result in the loss of hair as aforesaid of plaintiff or guilty of some negligence in the mixture of said ingredients in said bottle, and was negligent in advertising and selling to the public, and particularly to the plaintiff, said product with its unsafe and dangerous ingredients or mixture; that defendant, Rexall Drug Company, doing business as Cara Nome Rexall, was negligent in distributing this product without proper safeguards concerning its use, and advertising and selling to the public this product without warning concerning its [3] dangerous ingredients and in joining with the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, in the combined operation of manufacturing and sale under their name for a common purpose.

V.

That said product was advertised and sold as a product safe and suited to be used for the purposes for which it was used, as a home permanent waver or curler for the hair; that it was represented by

defendants to be non-injurious to the hair and safe for the purposes for which it was sold and purchased; that plaintiff relied upon said representations and upon the strength of said representations used said product as aforesaid and suffered the ill effects of the use of same as aforesaid.

VI.

That as the result of the use and application of said product plaintiff has been disfigured for life, made bald, subjected to humiliation and embarrassment and caused mental anguish, and will continue to suffer from baldness, humiliation, embarrassment, mental anguish and all the naturally attendant incapacities socially and economically; that she has incurred expenses of medical clinics, doctors, specialists, medicines and other treatments in the endeavor to be cured and to be restored to the status of a girl with hair.

Plaintiff Demands a Jury Trial.

Wherefore, plaintiff demands judgment in the amount of Two Hundred and Fifty Thousand Dollars ($250,000.00), together with costs and disbursements herein.

Dated this 4th day of February, 1957.

/s/ JAMES G. ROURKE,
LANIER, LANIER & KNOX,

/s/ By P. W. LANIER, JR.,
A Member of the Firm,
Attorneys for Plaintiff. [4]

EXHIBIT "A"

LETTERS OF GUARDIANSHIP

State of North Dakota
County of Foster—ss.

In the County Court, before Hon. M. P. Roberts, Judge.

In the Matter of the Guardianship of Sandra Nihill, Minor.

John Nihill, Petitioner, vs. Sandra Nihill, Respondent.

State of North Dakota
County of Foster—ss.

The State of North Dakota, to all to whom these presents shall come or may concern.

Whereas, John Nihill was duly appointed Guardian of the person and estate of Sandra Nihill, minor child of Petitioner of McKinnon Township in the County of Foster in the State of North Dakota, by the order of the County Court of said County of date the 28th day of May, 1956, and has duly qualified accordingly.

Now, Therefore, Know ye, that he the said John Nihill is authorized to enter upon the discharge of his duties as such guardian and continue therein until the revocation of these letters.

In Witness Whereof, the signature of the Judge of said Court is hereto subscribed and attested by

the seal of said Court in the City of Carrington in said County of Foster and State of North Dakota, this 28th day of May, 1956.

By the Court:

/s/ M. P. ROBERTS,
Judge of the County Court.

State of North Dakota
County of Foster—ss.

John Nihill, being first duly sworn does depose and say that he will support the Constitution of the United States and the Constitution of the State of North Dakota and that he will faithfully and according to law to the best of his ability perform all of the duties of his trust as Guardian of the above named Sandra Nihill, minor, to which trust he has been duly appointed by the above-named Court.

/s/ JOHN NIHILL,

Subscribed and sworn to before me this 28th day of May, 1956.

[Seal] /s/ T. A. RONEY,

Notary Public, Foster County, N. Dak. My commission expires Dec. 4, 1959. [5]

Certificate of Certification Attached. [6]

[Endorsed]: Filed February 19, 1957.

United States District Court for the Southern District of California, Central Division

Civil Action File No. 258-57 WM

SANDRA MAE NIHILL, a Minor, by her Father and Regular Guardian, JOHN NIHILL,
Plaintiff,

vs.

REXALL DRUG COMPANY, a Corporation, Doing Business as CARA NOME REXALL, and ARNOLD L. LEWIS, Doing Business as STUDIO COSMETICS COMPANY,
Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon James G. Rourke, plaintiff's attorney, whose address is First Western Bank Building, Santa Ana, California, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: February 19, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk of Court,

/s/ IRWIN YOUNG,
Deputy Clerk. [7]

Return on Service of Writ
United States of America
Southern District of California—ss.

I hereby certify and return that I served the annexed summons on the therein-named Arnold L. Lewis by handing to and leaving a true and correct copy thereof, together with a copy of the complaint, with deft's wife, Ethel Lewis, a person of suitable age and discretion now residing at the dwelling house and usual place of abode of the above-named defendant at 834 Thayer Ave., W. L. A., Calif., in said District, on the 23rd day of Feb., 1957.

ROBERT W. WARE,
U. S. Marshal,

/s/ By R. J. VALENCIA,
Deputy.

Fee:	$2.00
Mileage @ 10c mi.	$2.80
Total:	$4.80 [8]

Return on Service of Writ
United States of America
Southern District of California—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Rexall Drug Company & Corp., together with a copy of the complaint, by handing to and leaving a true and correct copy thereof with Theodore Sirene, Agent, personally at 510 So. Spring St. at Los Angeles,

Calif., in the said District at 3 p.m., on the 25th day of Feb., 1957.

R. W. WARE,
United States Marshal,

/s/ By JOHN E. SEARS,
Deputy.

Marshal's fees	$2.00
Mileage: 2 at 10c	.20
	$2.20 [9]

[Endorsed]: Filed February 27, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff for Right of Action Alleges:

Cause of Action No. One

I.

That she is a minor of the age of fifteen years, a resident citizen of the State of North Dakota, and brings this action through her father and regular guardian, John Nihill, a resident citizen of the State of North Dakota, duly qualified as regular guardian of the plaintiff on May 28, 1956, through the County Court of Foster County, North Dakota, and certified copy of Letters of Guardianship is attached hereto and made a part hereof, designated as Exhibit "A"; the defendant, Rexall Drug Company, is a corporation, organized and existing un-

der the laws of the State of Delaware and doing business in the State of California under the name, Cara Nome Rexall, a fictitious name; and the defendant, Arnold L. Lewis, is doing business under the name, Studio Cosmetics Company, and is presently a citizen and resident of California doing business at Los Angeles, California; that the amount involved herein is more than $3,000.00, exclusive of costs; that party plaintiff is a resident citizen of a different state from parties defendant. [10]

II.

That defendant, Rexall Drug Company, doing business as Cara Nome Rexall, was the distributor of said product in association with the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company; that Arnold L. Lewis, doing business as Studio Cosmetics Company, was the manufacturer of said product; and as such manufacturer and distributor, defendants advertised, sold and distributed said product throughout the United States and Canada, including North Dakota.

III.

That on the 5th day of February, 1955, plaintiff purchased from the Kensal Drug Company of Kensal, North Dakota, a bottle of said product of Cara Nome, which had been obtained from and through defendants; this product, when so purchased, was sealed and was a product that had come from the factory in the state in which it was at the time of purchase; this product was immediately taken to

the home of plaintiff and there opened and immediately used pursuant to directions accompanying said product; that within ten days after said use, plaintiff's hair began coming out and continued to do so until in a short while all was gone, and she was rendered hairless on the head and has ever since been bald and will always be so disfigured.

IV.

That said product and the application thereof as aforesaid was the direct and proximate cause of the loss of hair as aforesaid by plaintiff; that defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, the manufacturer, was guilty of negligence in permitting some ingredient to be placed in said bottle that could result in the loss of hair as aforesaid of plaintiff or guilty of some negligence in the mixture of said ingredients in said bottle, and was negligent in advertising and selling to the public, and particularly to the plaintiff, said product with its unsafe and dangerous ingredients or mixture; that defendant, Rexall Drug Company, doing business as Cara Nome Rexall, was negligent in distributing [11] this product without proper safeguards concerning its use, and advertising and selling to the public this product without warning concerning its dangerous ingredients and in joining with the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, in the combined operation of manufacturing and sale under their name for a common purpose.

Cause of Action No. Two

I.

That said product was advertised and sold as a product safe and suited to be used for the purposes for which it was used, as a home permanent waver or curler for the hair; that it was represented by defendants to be non-injurious to the hair and safe for the purposes for which it was sold and purchased; that plaintiff relied upon said representations and upon the strength of said representations used said product as aforesaid and suffered the ill effects of the use of same as aforesaid.

II.

That as the result of the use and application of said product, plaintiff has been disfigured for life, made bald, subjected to humiliation and embarrassment and caused mental anguish, and will continue to suffer from baldness, humiliation, embarrassment, mental anguish and all the naturally attendant incapacities socially and economically; that she has incurred expenses of medical clinics, doctors, specialists, medicines and other treatments in the endeavor to be cured and to be restored to the status of a girl with hair.

Plaintiff Demands a Jury Trial.

Wherefore, Plaintiff demands judgment in the amount of Two Hundred and Fifty Thousand Dollars ($250,000) together with costs and disbursements herein.

Dated this 18th day of March, 1957.

/s/ JAMES G. ROURKE,
Attorney for Plaintiff,
LANIER, LANIER & KNOX,
/s/ By P. W. LANIER SR.,
A Member of the Firm,
Attorneys for Plaintiff. [12]

[Note: Exhibit "A"—Letters of Guardianship is the same as attached to Complaint at page 7.]

Affidavit of Service by Mail Attached. [14]

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now the defendants Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and Arnold L. Lewis, doing business as Studio Cosmetics Company, and answering plaintiff's complaint on file herein, admit, deny and allege as follows:

Cause of Action No. One

I.

Answering paragraph III thereof, these answering defendants have no information or belief sufficient to enable them to answer the allegations contained therein, and basing their answer on said ground, deny generally and specifically each and every allegation contained therein and the whole thereof. [15]

II.

Answering paragraph IV thereof these answering defendants deny generally and specifically each and every allegation contained therein and the whole thereof.

Cause of Action No. Two

I.

Answering paragraph I thereof, these answering defendants deny generally and specifically each and every allegation contained therein and the whole thereof.

II.

Answering paragraph II thereof, these answering defendants deny generally and specifically each and every allegation contained therein and the whole thereof.

As and for a Separate and Distinct Affirmative Defense These Answering Defendants Allege as Follows:

I.

That the injuries, damages and loss, if any, sustained by the plaintiff herein, were proximately caused and contributed to by the negligence on the part of the plaintiff in that she did not exercise ordinary care on her own behalf at the time and place referred to in said Amended Complaint.

For a Second, Separate and Distinct Affirmative Defense These Answering Defendants Allege as Follows:

I.

That whatever injury or damage, if any, was suffered by the plaintiff, whether as alleged or otherwise, the same was a direct and proximate and sole result of plaintiff's physical and bodily condition and constitutional composition on, prior and subsequent to all times as mentioned in plaintiff's Amended Complaint on file herein. [16]

For a Third, Separate and Distinct Affirmative Defense These Answering Defendants Allege as Follows:

I.

That plaintiff is barred from maintaining an action herein and these answering defendants are not liable herein for any alleged breach by reason of the failure of plaintiff to give notice within a reasonable time of this breach.

Defendants Demand a Jury Trial.

Wherefore, these answering defendants pray that plaintiff take nothing by reason of the Amended Complaint on file herein, for cost of suit herein incurred, and for such other and further relief as to the Court seems just and proper in the premises.

REED, CALLAWAY, KIRTLAND & PACKARD,

/s/ By FREDERICK P. BACKER,
Attorneys for Defendants. [17]

Affidavit of Service by Mail Attached. [18]
Duly Verified.

[Endorsed]: Filed April 15, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES

Comes the plaintiff and requests of the defendants that the following interrogatories, pursuant to Rule 33 of the Federal Rules of Civil Procedure, be answered under oath by any of your officers or agents competent to testify in your behalf who know the facts about which inquiry is made, and that the answers be served on plaintiff within 15 days from the date these interrogatories are served upon you. [19]

* * * * *

[Note: Interrogatories are included in the Answers at pages 18-25.]

LANIER, LANIER & KNOX,
/s/ By P. W. LANIER, SR.,
A Member of the Firm,
/s/ JAMES G. ROURKE,
Attorneys for Plaintiff. [23]

Affidavit of Service by Mail Attached. [24]

[Endorsed]: Filed June 5, 1957.

[Title of District Court and Cause.]

ANSWERS TO PLAINTIFF'S INTERROGATORIES

State of California
County of Los Angeles—ss.

Comes now the defendant Arnold L. Lewis doing business as Studio Cosmetic Company and in an-

swer to plaintiff's interrogatories in the captioned case and being first duly sworn answers the questions as follows:

No. I. Do you:

(a) Specifically admit paragraphs I and II of Amended Complaint? [33]

(b) If not, what allegations of said paragraphs are denied?

Answer: Defendant Arnold L. Lewis admits that he is doing business under the name of Studio Cosmetic Company and is presently a citizen and resident of the State of California and engaged in business in the City of Los Angeles, County of Los Angeles, State of California. This defendant has no personal knowledge of any of the remaining allegations in said paragraph and basing his denial on that ground denies all of the remaining allegations of said paragraph.

No. II. (a) Under the laws of what state is Rexall Drug Company, a corporation, organized?

Answer: Being answered in a separate document by Rexall Drug Company.

(b) Of what state is defendant, Arnold L. Lewis, a resident?

Answer: Defendant Arnold L. Lewis admits that he is a resident of the County of Los Angeles, State of California.

No. III. In the first defense set up in defendants' answer you claim plaintiff's negligence contributed to her alleged injury—state in what way she could use this product, Cara Nome, so as to cause the alleged injury?

Answer: The misuse of the product and by not following the proper directions set forth in each package could cause breakage of the hair by reason of the solution remaining on the hair too long or because the neutralization was not properly done in accordance with the instructions. Another cause of hair breakage would be the possible use by the plaintiff of some other product such as a bleach or peroxide which could have weakened the hair or a shampoo that might have had a very strong detergent action prior to the use of the permanent wave product.

No. IV. What are the ingredients, chemical or otherwise, in Cara Nome? [34]

Answer: The ingredients used in the Cara Nome permanent wave are common chemicals used in virtually all permanent wave preparations on the market, namely, ammonium thioglycolate, distilled water and aqua ammonia C.P.

No. V. In what proportions are such ingredients placed in a bottle of the size alleged to have been sold to plaintiff herein?

Answer: Ammonium thioglycolate — 5%; aqua ammonia C.P.—.75%; distilled water—94.25%.

The above percentages of ingredients are used in the preparation of the Cara Nome home permanent wave.

No. VI. If your answer to the foregoing question is that you don't know because you have not seen the bottle, if you are shown the alleged bottle would you be able to say:

(a) Whether or not you manufactured a product sold in such a bottle?

Answer: If shown the bottle I would be able to state whether or not that bottle was actually filled with our product.

(b) What the ingredients therein are?

Answer: The ingredients would be as heretofore stated.

(c) Are the ingredients in the same proportion in all such products?

Answer: Virtually the same.

No. VII. Is any one or more such ingredients used alone or in too great quantity harmful to hair or scalp?

Answer: Never had occasion to make the test to determine. To my knowledge any one of ingredients is never used alone.

No. VIII. Are the ingredients in Cara Nome

(a) Mixed and bottled under supervision of a graduate chemist?

Answer: Yes.

(b) And, if so, give name or names of such [35] chemists and their addresses.

Answer: Chemist no longer in our employ*ee*. Do not recall at this time the name and address of chemist.

No. IX. Are you able to say as to Cara Nome sold at the time of alleged sale to plaintiff by Kensal Drug Company of Kensal, North Dakota?

Answer: Cannot say.

(a) Through what companies, distributors or persons it went from the time it was manufactured until it reached Kensal Drug Company?

Answer: I do not know.

(b) If your answer is yes, trace the course of said product through such companies, distributors or persons?

Answer: Cannot answer.

No. X. Are the bottles of Cara Nome:

(a) Sealed and air tight at time of manufacture?

Answer: Yes.

(b) Would opening or unsealing of said bottle bring about a chemical or any change in the product that would result in injury from its use.

Answer: I do not know.

No. XI. (a) Has the product, Cara Nome, been submitted to specialists in the medical profession on hair and scalp, together with the list of ingredients and proportions used to determine what effects would be on hair and scalp?

Answer: No.

(b) If so, give name or names of such specialists and their addresses.

Answer: ——

No. XII. (a) If experts or specialists as referred to in the foregoing question gave written opinions, will you produce same for examination and use on the trial or at the pretrial conference if [36] such is held?

Answer: ——

(b) If such opinions were oral what, in substance, were they?

Answer: ——

No. XIII. (a) When did you begin the manufacture and distribution of Cara Nome?

Answer: Approximately 1950.

(b) What changes, if any, have been made since in this product?

Answer: None.

(c) Why were such changes made?

Answer: ——

(d) Upon whose advice were such changes made?

Answer: ——

No. XIV. (a) Did defendant, Rexall Drug Company, before engaging in the distribution of said product, familiarize itself with the ingredients in said product?

Answer: Being answered in a separate document by Rexall Drug Company.

(b) Did the owner thereof, Arnold L. Lewis, so familiarize himself with the ingredients in said product and the proportionate mixture of such ingredients in same?

Answer: Yes.

No. XV. (a) (b) (c) Being answered in a separate document by Rexall Drug Company.

No. XVI. Being answered in a separate document by Rexall Drug Company.

No. XVII. Is any other company or organization

(a) Authorized to manufacture said product?

Answer: No.

(b) If your answer is yes, give name and address [37] of such company or organization.

Answer: ——

No. XVIII. In paragraph I of the second affirmative defense in the Answer served herein, it is said that whatever injury or damage was suffered by plaintiff was a direct, proximate and sole result of

plaintiff's physical and bodily condition and constitutional composition prior and subsequent to all times mentioned in plaintiff's Amended Complaint.

(a) What bodily condition and constitutional composition prior to the use of said product alleged to have caused the loss of hair by the use thereof could be such cause of such loss of hair by plaintiff?

Answer: Various.

(b) What bodily condition and constitutional composition subsequent to the use of said product could cause the loss of hair as alleged by plaintiff?

Answer: Various.

(c) On the bottle of said product alleged to have been sold to plaintiff or any bottle manufactured and distributed by defendants, or any box, pamphlet, instructions or directions accompanying such product when sold to the purchaser, did you warn against the use of same by one of such bodily and physical condition and constitutional composition?

Answer: Up to the present time the exact body and physical conditions and constitutional composition of the plaintiff are unknown, but instructions contained in said product set forth the manner in which it should be used and conditions under which is should be used.

(d) Are we to understand that at the time of the manufacture and sale of such product you were aware that certain persons with certain physical compositions, constitutional and physical, could and would suffer such results as alleged by plaintiff [38] that she suffered from the use of said product?

Answer: No.

(e) If you describe the physical bodily condition and constitutional composition of a person who could and would suffer the results from the use of said product, alleged by plaintiff to have been suffered from the use of same, from what authority did you get your information, giving names and addresses?

Answer: ——

Nos. XIX, XX, XXI and XXII. Being answered in a separate document by Rexall Drug Company.

/s/ ARNOLD L. LEWIS.

Subscribed and sworn to before me this 26th day of August, 1957.

[Seal] /s/ MARGUERITE L. MAIRE,
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires December 19, 1958. [39]

Affidavit of Service by Mail Attached. [40]

[Endorsed]: Filed August 27, 1957.

[Title of District Court and Cause.]

ANSWERS TO PLAINTIFF'S INTERROGATORIES

State of California
County of Los Angeles—ss.

Comes now the defendant Thomas H. Stark, Assistant Manager Insurance and Tax, in charge of all claims for defendant Rexall Drug Company, a corporation, and in answer to plaintiff's interroga-

tories in the captioned case and being first duly sworn answers the questions as follows:

Nos. I (a) (b), II (b), III, IV, V, VI (a) (b) (c), VII, VIII (a) (b), IX (a) (b), X (a) (b), XI (a) (b), XII (a) (b), XIII (a) (b) (c) (d), [41] XIV (b), XVII (a) (b), and XVIII (a) (b) (c) (d) (e) being answered in a separate document by Arnold L. Lewis.

No. II. (a) Under the laws of what state is Rexall Drug Company, a corporation, organized?

Answer: Delaware.

No. XIV. (a) Did defendant, Rexall Drug Company, before engaging in the distribution of said product, familiarize itself with the ingredients in said product?

Answer: Yes.

No. XV. (a) When did Rexall Drug Company become distributor of said product?

Answer: April 1953.

(b) And for what territory?

Answer: Nationwide.

(c) If there is a written contract between defendant manufacturer and defendant distributor, will you produce same on the trial for examination and use, or at the pretrial conference if same is held?

Answer: Written contract is a purchase order contract; Rexall Drug Company is willing to produce copy of form of purchase order used.

No. XVI. (a) Is Arnold L. Lewis, doing business as Studio Cosmetic Company, a director, officer or agent of the defendant, Rexall Drug Company?

Answer: No.

(b) If so, what is this connection?

Answer: ——

No. XIX. Does the defendant have in its custody or control the original of the letter dated July 5, 1955, from T. A. Roney to Rexall Drug Company, Department F 8480, Beverly Blvd., Los Angeles 54, California, re Sandra Nihill?

Answer: No. [42]

No. XX. If the answer to the above question is no, does the defendant, Rexall Drug Company, admit receiving such letter?

Answer: No.

No. XXI. Was the defendant, Arnold L. Lewis, notified by the defendant, Rexall Drug Company, of the receipt of this letter?

Answer: No.

No. XXII. If the answer to the foregoing question is yes, will the defendant produce the original of this letter at the meeting of the attorneys on the trial or at the pretrial conference for examination or copying?

Answer: ——

/s/ THOMAS H. STARK.

Subscribed and sworn to before me this 14th day of August, 1957.

[Seal] /s/ NORMA N. KING,
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires June 18, 1961. [43]

Affidavit of Service by Mail Attached. [44]

[Endorsed]: Filed August 27, 1957.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE ORDER

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, It Is Ordered:

I.

This is an action for damages based on two counts, negligence and breach of warranty; the pleadings consist of a complaint and a joint answer of both defendants; the plaintiff is a minor suing through her general guardian, her father, John Nihill; the defendant Rexall Drug Company is a Delaware corporation, authorized to do business in the State of California; the defendant Arnold L. Lewis is an individual doing business under the fictitious firm name and style of Studio Cosmetics Company. [45]

II.

Federal jurisdiction is invoked upon diversity of citizenship of the plaintiff and both parties defendant, and is brought for an amount in excess of $3,000.00, exclusive of costs.

III.

Admitted facts are as follows:

1. The plaintiff is a minor, suing through her general guardian, her father John Nihill.

2. The defendant Rexall Drug Company, a corporation, is a Delaware corporation, authorized to do business in the State of California.

3. The defendant Arnold L. Lewis is an individual doing business under the fictitious firm name and style of Studio Cosmetics Company, and resident of California.

4. The defendant Arnold L. Lewis is the manufacturer of a product known and sold as Cara Nome Natural Curl Brand Pin Curl Permanent.

5. The defendant Rexall Drug Company is the national distributor of said product under purchase order introduced as Exhibit .... Said defendant Rexall Drug Company did not participate in the preparation or manufacture of the product but purchased and sold said product in sealed containers as received from defendant Arnold L. Lewis doing business as Studio Cosmetics Company.

6. Said product is sold nation-wide, including the State of North Dakota.

7. It is agreed that there was a complete sheet of instructions for application of the solution and neutralizer, prepared by the manufacturer, included in the Cara Nome Natural Curl Brand Pin Curl Permanent kit purchased by the plaintiff.

These admissions of fact were true at all times material herein. [46]

IV.

There are no reservations as to the facts stated in Paragraph III.

V.

The following issues of fact, and no others, remain to be litigated upon the trial:

1. Whether or not the defendants manufactured

or sold a product containing chemicals in quantities that were or should have been known to be inherently dangerous for human use.

2. Whether or not the defendants negligently failed to warn the public of the contents of the solution and neutralizer and what their chemical effects could or could not be.

3. Whether or not the chemicals used were in dangerous proportion to the entire solution.

4. Whether or not the particular batch of solution, from which came the purchase by this plaintiff and others in her area of the country, was an unusually strong solution and particularly dangerous to hair and scalp, and whether or not the product caused damage to the hair of this plaintiff, or others.

5. Whether or not said solution manufactured or sold by these defendants did actually damage the hair of the plaintiff.

6. Whether or not there was proper warning as to the use of their product in the directions accompanying the solution and the kit.

7. Whether or not the defendants negligently failed to properly test said solution.

8. Whether or not the defendants had knowledge of any dangers which the users of their product would not ordinarily discover.

9. Whether or not the plaintiff followed the directions as contained in the kit.

10. Whether or not this plaintiff was physically so [47] constituted as to be peculiarly allergic to the product.

11. Whether or not the loss of hair of the plaintiff is permanent.

12. Whether or not the product was reasonably fit for the purpose for which it was intended.

13. Whether or not timely notice was given to the defendants by plaintiff.

VI.

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

Plaintiff

1. The pictures of the plaintiff immediately prior to loss of her hair.

The defense will object to plaintiff's photograph allegedly depicting the plaintiff immediately preceding the use of the product on the ground that the picture was taken too long before the alleged loss of hair.

2. Pictures of the plaintiff after loss of hair.

3. The bottle which contained the hair wave solution actually involved herein.

The defense will object to the foundation for introducing said bottle in evidence and its materiality.

4. Another Cara Nome Natural Curl Brand Pin Curl Permanent kit of identical kind used by the plaintiff, said kit being purchased from the same Rexall Drug Store at about the same period of time as plaintiff's purchase, and bearing the same batch number, 181.

Defense will object to the foundation for the

introduction of said kit in evidence and its materiality.

5. Report of biochemist from his analysis and break-down of said Cara Nome Natural Curl Brand Pin Curl Permanent kit listed [48] in number 4 above.

Defense will object to the qualifications of the biochemist and the materiality of his evidence.

6. Portions of plaintiff's hair and braids prior to the application of the wave solution, together with portions of plaintiff's hair which fell out after the application of the wave solution.

Defense reserves objections.

7. A series of directions for application of other home cold wave kits such as Toni, including the warnings contained therein.

Defense will object on the ground that it is immaterial insofar as the use of the subject product is concerned.

Defendants

1. Kit of Cara Nome Natural Curl Brand Pin Curl Permanent as offered for sale by defendants at about the period of time of plaintiff's alleged purchase and expert testimony regarding the kit.

Plaintiff will make no objection to the introduction of a similar kit for the purpose of showing the mechanical unit contents of that kit, but will reserve right to objection as to foundation and materiality of the chemical contents of the solution and neutralizer of the kit, unless shown that it is from the same batch as that used by the plaintiff and unless shown that the directions contained

therein are the same directions contained in the kit purchased by the plaintiff.

VII.

The following issues of law, and no others, remain to be litigated upon the trial.

1. Whether or not the doctrine of Res Ipsa Loquitur applies.

2. Whether or not under the statutes and decisions of [49] North Dakota this is a case that falls within the confines of the implied warranty statute.

3. Whether or not any allergy is a defense to this action.

4. Whether or not the negligence of the defendants, if any, is a proximate cause of this injury.

5. Whether or not plaintiff failed to exercise ordinary care on her own behalf at the time and place the product of the defendants was used, as alleged by plaintiff.

6. Whether or not the injury and/or damage, if any, suffered by plaintiff was a direct and proximate and sole result of plaintiff's physical and bodily and constitutional composition at the times mentioned in plaintiff's amended complaint.

It is agreed between counsel that the substantive law of North Dakota applies in this action.

VIII.

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be

litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated:

.....

Judge of the U. S. District Court.

Approved as to Form and Content:

LANIER, LANIER & KNOX,
/s/ P. W. LANIER JR.,
Attorneys for Plaintiff.

SPRAY, GOULD & BOWERS,
/s/ By MALCOLM ARCHBALD,
Attorneys for Defendant Rexall Drug Company.

REED, CALLAWAY, KIRTLAND AND PACKARD,
/s/ By FREDERICK P. BACKER,
Attorneys for Defendant Arnold L. Lewis. [50]

[Title of District Court and Cause.]

SEPARATE ANSWER OF REXALL DRUG COMPANY TO AMENDED COMPLAINT

Comes now the defendant, Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and after permission of Court first had and obtained separating itself from all other defendants in the above cause, files this its separate answer to plaintiff's amended complaint:

I.

Admits each and every allegation contained in Paragraph I of the first cause of action of plaintiff's amended complaint and further admits that at and prior to the times mentioned in the complaint defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, was engaged in the manufacture of the product mentioned in the complaint and that this answering defendant purchased said product from Arnold L. Lewis and distributed, sold [51] and advertised said product for the purpose of sale throughout the United States and Canada including North Dakota and further alleges that during all times, said product was handled by this answering defendant by purchase from the manufacturer or by sale to retail customers, or otherwise, that said product was sealed and in the same state in which it was received from the factory at the time of sale of said product to retailers.

II.

For lack of knowledge, information and belief sufficient to enable it to answer in respect thereto, and basing its denial upon such ground, denies each and every allegation contained in Paragraph III of the first cause of action of plaintiff's amended complaint except that this answering defendant admits that if plaintiff did purchase a bottle of said product from Kensal Drug Company it was then sealed and in the same condition as it had been when it left the factory of Studio Cosmetics Company.

III.

Denies each and every allegation of the first cause of action of plaintiff's complaint not hereinabove admitted or denied for lack of information or belief.

IV.

Denies that as a proximate result of any act or acts, omission or commission on the part of this answering defendant, its agents, servants or employees plaintiff, Sanda Nihill, was injured or damaged in the sum of $250,000.00, or any other sum, whether as alleged in the first amended complaint, or otherwise, or at all.

Answer to Second Cause of Action

I.

Denies each and every allegation contained in Paragraphs I and II of the second cause of action of plaintiff's [52] amended complaint.

II.

Denies that as a proximate result of any conditions alleged in the second cause of action of plaintiff's amended complaint plaintiff, Sanda Nihill, was injured or damaged in the sum of $250,000.00, or any other sum, whether as alleged in the complaint, or otherwise, or at all.

For a First, Separate and Distinct Affirmative Defense, This Answering Defendant Alleges:

I.

That the injuries, damages and loss, if any, sustained by plaintiff herein, were proximately caused

and contributed to by the negligence on the part of the plaintiff in that she did not exercise ordinary care on her own behalf at the time and place referred to in said amended complaint.

For a Second, Separate and Distinct Affirmative Defense, This Answering Defendant Alleges:

I.

That whatever injury or damage, if any, was suffered by the plaintiff, whether as alleged or otherwise, the same was a direct and proximate and sole result of plaintiff's physical and bodily condition and constitutional composition on, prior and subsequent to all times as mentioned in plaintiff's amended complaint on file herein.

For a Third, Separate and Distinct Affirmative Defense, This Answering Defendant Alleges:

I.

That the allegations contained in the first and second causes of action of plaintiff's amended complaint are insufficient to allege a cause of action against this answering defendant on either the theory of negligence or the theory of an alleged breach of warranty. [53]

Wherefore, this answering defendant prays that plaintiff take nothing by her complaint and that this answering defendant have and recover its costs of

suit incurred herein together with such other and further relief as the Court deems just and proper.

SPRAY, GOULD & BOWERS,
/s/ By MALCOLM ARCHBALD,
Attorneys for Defendant Rexall Drug Company. [54]

Affidavit of Service by Mail Attached. [55]

[Endorsed]: Filed January 30, 1958.

[Title of District Court and Cause.]

SEPARATE ANSWER OF ARNOLD L. LEWIS, DOING BUSINESS AS STUDIO COSMETICS COMPANY, TO AMENDED COMPLAINT

Comes now the defendant Arnold L. Lewis, doing business as Studio Cosmetics Company, and after permission of Court first had and obtained separating itself from all other defendants in the above cause, files this his separate answer to plaintiff's amended complaint:

Cause of Action No. One

I.

Answering paragraph III thereof, this answering defendant has no information or belief sufficient to enable him to answer the allegations contained therein, and basing his answer on said ground, denies both generally and specifically each and every allegation contained therein, and the whole thereof.

II.

Answering paragraph IV thereof this answering defendant denies both generally and specifically each and every allegation contained therein, and the whole thereof.

Cause of Action No. Two

I.

Answering paragraph I thereof, this answering defendant denies both generally and specifically each and every allegation contained therein, and the whole thereof.

II.

Answering paragraph II thereof, this answering defendant denies both generally and specifically each and every allegation contained therein, and the whole thereof.

As and For a Separate and Distinct Affirmative Defense This Answering Defendant Alleges As Follows:

I.

That the injuries, damages and loss, if any, sustained by the plaintiff herein, were proximately caused and contributed to by the negligence on the part of the plaintiff in that she did not exercise ordinary care on her own behalf at the time and place referred to in said Amended Complaint.

As and For a Second, Separate and Distinct Affirmative Defense This Answering Defendant Alleges As Follows:

I.

That whatever injury or damage, if any, was suf-

fered by the plaintiff, whether as alleged or otherwise, the same was a direct and proximate and sole result of plaintiff's physical and bodily condition and constitutional composition on, prior and subsequent to all times as mentioned in plaintiff's amended complaint on file herein.

For a Third, Separate and Distinct Affirmative Defense This Answering Defendant Alleges As Follows: [57]

I.

That plaintiff is barred from maintaining an action herein and this answering defendant is not liable herein for any alleged breach by reason of the failure of plaintiff to give notice within a reasonable time of this breach.

This Defendant Demands a Jury Trial.

Wherefore, this answering defendant prays that plaintiff take nothing by reason of the amended complaint on file herein, for costs of suit herein incurred, and for such other and further relief as to the Court seem just and proper in the premises.

REED, CALLAWAY, KIRTLAND & PACKARD,

/s/ By FREDERICK P. BACKER,

Attorneys for Defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company. [58]

Duly Verified.

Affidavit of Service by Mail Attached. [59]

[Endorsed]: Filed February 3, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

No. 1

You are instructed that the rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

California Jury Instructions, Page 28, No. 33. [60]

No. 2

You are instructed that in this case there has been a conflict in the testimony of expert witnesses concerning the cause of the loss of hair by the Plaintiff and whether or not that loss of hair is permanent. You must resolve that conflict. To that end, you must weigh one expert's opinion against that of another, and the reasons given by one against those of another, and the relative credibility and knowledge of the experts who have testified. Thereupon, you shall find in favor of that expert testi-

mony which, in your opinion, is entitled to the greater weight.

California Jury Instructions, Page 29, No. 33-a. [61]

No. 3

You are instructed that according to the American Experience Table of Mortality, the expectancy of life of one aged 14 years is 46.16 years.

This fact, of which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if you find that Plaintiff is entitled to a verdict.

However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question.

California Jury Instructions, Page 219, No. 177. [62]

No. 4

You are instructed that if, and only in the event, you should find that there was an accidental occurrence as claimed by the Plaintiff, namely:

That the Plaintiff used a home cold wave solution manufactured by the Defendant, Studio Cosmetics Company, which contained a chemical of sufficient strength to cause permanent injury to her hair and scalp;

and if you should find that from that accidental event, as a proximate result thereof, Plaintiff has suffered injury, you are instructed as follows: an inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the Defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the Plaintiff Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the Defendant to rebut the inference by showing that it did, in fact, exercise the utmost care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part.

California Jury Instructions, Page 319, No. 206; Burt vs. Lake Region Flying Service, 54 N.W. 2d 339 (N. Dak.); Farmers Home Mutual Insurance Company of Medelia, Minnesota, et al. vs. Grand Forks Implement Company, 55 N.W. 2d 315; Bish vs. Employers Liability Insurance Corp., 236 Fed. 2d 62. [63]

[Handwritten Note]: Withdrawn by Mr. L. Not given.

No. 5

You are instructed that direct, positive evidence as to the cause of the injury is not necessary. You are instructed that it is sufficient if the evidence of circumstances will permit a reasonable inference of the alleged cause of injury and exclude other equally reasonable inferences of other causes.

Burt vs. Lake Region Flying Service, 54 N.W. 2d 339 (N. Dak.); Farmers Home Mutual Insurance Company of Medelia, Minnesota, et al. vs. Grand Forks Implement Company, 55 N.W. 2d 315. [64]

[Handwritten Note]: Not Given. Withdrawn in view A 11.

No. 6

You are instructed that negligence may be inferred from circumstances properly adduced in evidence, provided those circumstances raise a fair presumption of negligence; and circumstantial evidence alone may authorize the finding of negligence.

Burt vs. Lake Region Flying Service, 54 N.W. 2d 339 (N. Dak.); Farmers Home Mutual Insurance Company of Medelia, Minnesota, et al. vs. Grand Forks Implement Company, 55 N.W. 2d 315; Bish vs. Employers Liability Insurance Corp., 236 Fed. 2d 62. [65]

[Handwritten Note]: Not given. Replaced by amended No. 6.

No. 7

You are instructed that the manufacturer of a product that is either inherently dangerous, or reasonably certain to be dangerous if negligently made,

owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose for which its use is expressly or impliedly invited by the manufacturer. Failure to fulfill that duty is negligence.

California Jury Instructions, Page 425, No. 218. [66]

No. 8

You are instructed that this action is brought under two specific counts, one for negligence and the other for breach of warranty. If you find that the Defendants are guilty of no negligence which has caused the injury to the Plaintiff, you must go further.

If you find that the Defendants, or either of them, in its advertising has made representation as to quality and merits of its products aimed directly at the ultimate consumer and urges the consumer to purchase the product from a retailer, and such ultimate consumer does so in reliance on and pursuant to inducements of either of the Defendants and thereby suffers harm in the use of such product, then you shall find for the Plaintiff.

147 N. E. 2d 612. (Ohio 1958).

[Handwritten Note]: Withdrawn for Amended 8. [67]

No. 9

You are instructed that the issuance of an express warranty does not exclude an implied warranty. You are instructed that under the law applicable in this case, there is an implied warranty that the product described by the manufacturer is fit for the purpose for which it is intended, and if you find that the product used by the Plaintiff herein was unfit for the purpose for which it was intended and that it was properly used for that purpose and all directions and instructions of the manufacturer properly carried out, then proof of negligence is unnecessary although it may be present.

Green Mountain Mushroom Company, Inc. vs Brown; 95 Atlantic 2d 679 (Vermont); Blessington vs McCrory Stores Corp., 111 N. E. 2d 421; 37 A. L. R. 2d 698 (N.Y.); Basin Oil Company of California vs Baash-Ross Tool Company, 271, Pacific 2d 122. [68]

No. 10

You are instructed that where a product is sold under a trade name an express warranty does not exclude an implied warranty of reasonable fitness for the general public for which the product was manufactured and sold.

50 N.W. 2d 162, Wade vs Chariot Trailer Company (Mich.).

[Handwritten Note]: Withdrawn.

[Endorsed]: Filed April 1, 1958. [69]

[Title of District Court and Cause.]

JURY INSTRUCTIONS REQUESTED BY THE DEFENDANT, ARNOLD L. LEWIS DOING BUSINESS AS STUDIO COSMETICS COMPANY

The defendant, Arnold L. Lewis doing business as Studio Cosmetics Company, respectfully requests that the following instructions be given to the jury.

Dated: April 8, 1958.

REED, CALLAWAY, KIRTLAND & PACKARD,

/s/ By ROBERT C. PACKARD,
Attorneys for Defendant. [70]

No. 1

You are instructed that the defendant, Arnold L. Lewis doing business as Studio Cosmetics Co., is not the insurer or guarantor of plaintiff's condition. The duty of care imposed upon the defendant is not absolute, such as the liability of an insurer would be, but it is only his duty to use ordinary care under the circumstances. [71]

No. 2

The mere fact that the plaintiff, Sandra Mae Nihill, in this case claims to have received damages from the use of the cold wave solution does not prove that such cold wave solution was in fact defective or unfit for the purpose for which it was used. It is incumbent upon the plaintiff to show by

a preponderance of the evidence that such cold wave solution was, in fact, unfit and that the injuries which the plaintiff, Sandra Mae Nihill, received were, in fact, caused by reason of the unfitness of the product for the purpose for which it was used. You may not speculate as to the basis of the cause of the alleged injury.

[Penciled Note]: Withdrawn. [72]

No. 3

If the evidence in this case indicates that the condition of the plaintiff, Sandra Mae Nihill, may have been the result of some act or omission on her part, or may have been the result of natural causes beyond the control of the defendant, it will be your duty to find that the condition was not caused by reason of any act or omission on the part of the defendant, Arnold L. Lewis doing business as Studio Cosmetics Co. [73]

No. 4

In deliberating upon this case, you must bear in mind that not every accident gives rise to a cause of action upon which the party injured may recover damages from some one. Thousands of accidents occur every day, for which no one is to blame—not even the ones who are injured.

Mautino vs. Sutter Hospital, 211 Cal. 556. [74]

No. 5

If you believe, from all of the evidence, that the damage to the plaintiff, Sandra Mae Nihill, was due to some prior condition not discoverable by the de-

fendant in the exercise of ordinary care, then I instruct you that the plaintiff herein cannot recover for any damage which she may have received as the result of the application of the solution in question. [75]

No. 6

If you believe, from all of the evidence, that the damage alleged by the plaintiff, Sandra Mae Nihill, was due to some bodily condition or allergy, not discoverable by the defendant in the exercise of ordinary care, then I instruct you that the plaintiff herein cannot recover for any damage which she may have received as the result of the application of the solution.

[Penciled Note]: Refused. [76]

No. 7

The fact of the accident, that is to say, the fact that the plaintiff was injured, raises no presumption whatever of negligence against the defendant. The burden is upon the plaintiff to prove by evidence, other than mere fact, that the plaintiff was injured, and that the defendant was guilty of some one or more of the acts complained of, and that such acts of negligence on the part of the defendant directly or proximately caused the injury. [77]

No. 8

If you find from all of the evidence that the plaintiff's damage, if any, was caused as a result of a condition present in plaintiff's system, caused by prior treatments or neglect which was not the re-

sult of the application of the solution in question in this case, then I instruct you that you are to find for the defendant, Arnold L. Lewis doing business as Studio Cosmetics Co. [78]

[Penciled Note]: Withdrawn. Packard.

No. 9

You are instructed that if you believe from the evidence that the damage to the plaintiff might be attributable to any one of several causes with equal probability, then I instruct you that you must find against the plaintiff and for the defendant, Arnold L. Lewis doing business as Studio Cosmetics Co.

[Penciled Note]: Withdrawn. [79]

No. 10

You are instructed that in the event you cannot determine from the evidence whether the plaintiff, Sandra Mae Nihill's, injuries are the result of any one of a number of different possibilities, then I instruct you that you must find for the defendant Arnold L. Lewis doing business as Studio Cosmetics Co., and against plaintiff. [80]

No. 11

Where a product is delivered or sold to a person for use and instructions for the use of the product go with it, it is incumbent upon the plaintiff to prove by a preponderance of the evidence that such instructions were followed. The burden is upon the plaintiff. The evidence of compliance with the directions must be shown to you by competent testimony. If in the instant case the plaintiff, Sandra

Mae Nihill, has failed to show by any evidence which preponderates that she followed the directions given for the use of the cold wave solution, then you must find in favor of all of the defendants in this case and against the plaintiffs.

Wood Mutual Credit Company vs. Tobin, 120 N.J.L. 587. [81]

No. 12

If you believe from the evidence that at the time of the sale of the cold wave solution to the plaintiff, Sandra Mae Nihill, there was an express warranty and that as part thereof there was furnished to the said plaintiff directions for the use of the cold wave, there could be no liability by reason of any warranty unless such directions were followed and the cold wave used in accordance therewith.

[Penciled Note]: Withdrawn. [82]

No. 13

The Court instructs you that if in the sale of the cold wave solution the plaintiff, Sandra Mae Nihill, purchased such cold wave solution by its brand or trade name, there is no implied warranty as to fitness for any particular purpose.

[Penciled Note]: Withdrawn. [83]

No. 14

The defendant, Arnold L. Lewis doing business as Studio Cosmetics Co., would not be liable to the plaintiff for the breach of any express warranty

not directly communicated to the plaintiff by said defendant or his agents, servants and employees.

[Penciled Note]: Withdrawn. [84]

No. 15

Before damages may be recovered by reason of breach of warranty in connection with the sale of a commodity, such as cold wave solution, it must first be established by a preponderance of the evidence that the commodity was used in accordance with the directions, if any, furnished for the use of the consumer.

Henry Porter & Company vs. Lacy (1937) 268 Ky. 666.

[Penciled Note]: Withdrawn. [85]

No. 16

Before the plaintiff in this action can recover for a breach of warranty, she must prove by a preponderance of the evidence that the cold wave solution was used by her in the manner required by the instructions from the manufacturer or distributor, if any. If you believe from the evidence that instructions from the manufacturer or distributor were, in fact, furnished to plaintiff, you may not speculate as to whether such instructions were followed but there must be a preponderance of evidence that such instructions were followed.

Briggs vs. National Industries, Inc., 92 Cal. App. (2d) 542.

[Penciled Note]: Withdrawn. [86]

No. 17

The mere fact that I have in the course of these instructions given you particular instructions concerning a negligence and breach of warranty, is not to be construed by you as in any way an intimation by this Court that it feels that there has or has not been any proof upon that particular subject, nor are you to construe it as an expression of opinion of this Court upon the subject. The Court is required by law to give you instructions upon each theory advanced by the parties. [87]

No. 18

If you should believe from the evidence that instructions with reference to the use of the cold wave solution in question were furnished the plaintiff, Sandra Mae Nihill, and should further believe that the plaintiff, Sandra Mae Nihill, in the exercise of ordinary care should have followed said instructions and failed to do so, she was guilty of contributory negligence. If you should believe that the plaintiff, Sandra Mae Nihill, was negligent in this regard and that such negligence contributed to the injury and damage, if any, by the plaintiff sustained, your verdict must be in favor of the defendant. [88]

No. 19

The law makes it the duty of one who knows that he is threatened with damage to do what he reasonably can do to minimize his damage. If you believe from the evidence that subsequent to the time that the plaintiff, Sandra Mae Nihill, was on notice

that she had received certain injuries as a result of the use of the cold wave solution in question, it will be your further duty to decide whether she acted as a prudent person and in the exercise of ordinary care she continued to use the said cold wave solution. If you should further find from the evidence that she did not exercise such care you may not award damages, if any, which could have been avoided by the exercise of such care on the part of the plaintiff, Sandra Mae Nihill.

California Cotton, etc. Assn. vs Byrne, 58 Cal. App. (2d) 340.

[Penciled Note]: Withdrawn. [89]

No. 20

You are instructed that if you find from the evidence in this case that the plaintiff purchased the cold wave solution in question under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

Civil Code 1735, subsection 4.

[Penciled Note]: Withdrawn. [90]

No. 21

The plaintiff claims to have been damaged by reason of breach of certain express warranties made by the defendant. The burden is on the plaintiff in order for her to recover for the breach of any such warranty to prove by a preponderance of the evidence each of the following facts:

1. That such express warranty was, in fact, made

by the defendant sought to be charged. That such express warranty was actually communicated to plaintiff.

2. That she relied thereon.
3. That she was justified in such reliance.
4. That the warranty was breached.
5. That she sustained damages.
6. That those damages were the direct and actual consequence of such breach.

[Penciled Note]: Withdrawn by Packard. Give for Rexall. [91]

No. 22

You are instructed that the plaintiff cannot recover damages for breach of an express warranty if the statements claimed by plaintiff to have been made to her by the defendant, Arnold L. Lewis doing business as Studio Cosmetics Co., were merely affirmations as to the value of the cold wave solution or expressions of his opinion of the cold wave.

Civil Code, Section 1732; Williams vs. Lowenthal (1932) 124 Cal App. 179. [92]

[Penciled Note]: Withdrawn by Packard.

No. 23

It is immaterial if any warranties were made whether they were true or false if, in fact, the breach of such warranties was not the cause of plaintiff's damages, if any. In order for the plaintiff to recover upon a breach of warranty she must establish by a preponderance of the evidence that the particular warranty which she claims was false

and which was breached was the actual cause of the damage. [93]

[Penciled Note]: Withdrawn.

No. 24

Ladies and Gentlemen of the Jury:

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. [94]

Baji, 1

No. 25

If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

Baji, 2

No. 26

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection; nor may you draw any inference from the question itself. [96]

Baji, 3

No. 27

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to the action. [97]

Baji, 4

No. 28

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only

after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. [98]

Baji, 7

No. 29

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict. To that end, the court would remind you that in

your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth. [99]

Baji, 8

No. 30

Upon retiring to the jury room you will select one of your number to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. As soon as twelve of you will have agreed upon a verdict, you shall have it signed and dated by your foreman and then shall return with it to this room. [100]

Baji, 9

No. 31

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against

the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

Baji, 21

No. 32

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You must never assume or speculate to be true any insinuation carried or suggested by a question put to a witness by examining counsel or by the court. The examiner's question is not evidence except only as it explains or throws light upon the answer.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you. [102]

Baji, 23

No. 33

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against

the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption. The court will inform you of any presumption that may become applicable in this case. [103]

Baji, 24

No. 34

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a finding in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that a bal-

ance of probability exists pointing to the accuracy and honesty of the one witness. [104]

Baji, 25

No. 35

In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence that shows or pertains to the character of the witness for truth or integrity, or that pertains to his motives, or by proof that he has been convicted of a felony. [105]

Baji, 26

No. 36

A witness false in one part of her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless from all the evidence, you shall believe that the probability of truth favors her testimony in other particulars. [106]

Baji, 27

No. 37

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which lies within the power of one side to produce and of another to contradict.

If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by her on that point. [107]

Baji, 30

No. 38

In the present action certain testimony has been read to you by way of deposition.

You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you from the witness stand.

Baji, 31 [108]

No. 39

In the trial of this case there were instances when certain evidence was admitted as against one or more of the defendants, but denied admission as against the others.

Your attention was called to these matters when the rulings were made. But I would urge you again to keep in mind the distinctions pointed out in such rulings, and their effect. It may be difficult for you, when considering the case for or against

any one party, to completely disregard any evidence that you have heard or seen, but that is your plain duty with respect to evidence not admitted by the court as against that party, and you must try conscientiously to so treat such a situation.

Baji, 32 [109]

[Penciled Note]: Withdrawn.

No. 40

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

Baji, 33 [110]

[Penciled Note]: Withdrawn.

No. 41

In examining an expert witness, such as a physician and surgeon, counsel may propound to him a type of question known in law as a hypothetical question. By such a question the witness is asked

to assume to be true a hypothetical state of facts, and to give an opinion based on that assumption.

In permitting such a question, the Court does not rule, and does not necessarily find even in its own mind, that all the assumed facts have been proved. It only determines that those assumed facts are within the probable or possible range of the evidence.

It is for you, the jury, to find from all the evidence whether or not the facts assumed in a hypothetical question have been proved, and if you should find that any assumption in such a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

Failure to prove a fact assumed in a hypothetical question may make the opinion based on it entirely worthless, or the opinion may, nevertheless, have weight and value, depending on the relationship of such an assumed fact to the issues of the case, the facts proved and the expert opinion. In respect to such a matter, you will apply your own reasoning to the end of drawing a conclusion that will be just and sound.

Baji, 33-C [111]

No. 42

A physician may be permitted to testify concerning statements made to him by a patient in connection with his effort to learn the patient's history and condition for purposes of diagnosis and treatment. Such evidence is received and may be con-

sidered for only the limited purpose of showing the information upon which the physician based his opinions. The statements so repeated by him may not be regarded as evidence of their own truth. However, when a patient's statement to a physician consists of a spontaneous exclamation, cry, complaint or other expression of present pain or distress, the physician may give testimony of that experience as evidence tending to show that the patient then experienced pain or distress. However, also, if it appears that a person made a statement to a physician which was in conflict with that person's testimony in court, the inconsistency may be considered in determining the credibility of the witness.

Baji, 33-D [112]

[Penciled Note]: Withdrawn.

No. 43

The Court will endeavor to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the Court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

Baji, 35-A [113]

No. 44

Although there are two defendants in this action, it does not follow from that fact alone that if one is liable, both are liable. Each is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. The instructions given govern the case as to each defendant, insofar as they are applicable to him, to the same effect as if he were the only defendant in the action, and regardless of whether reference is made to defendant or defendants in the singular or plural form.

Baji, 53 [114]

No. 45

Negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. This definition of negligence applies irrespective of whose conduct is in question, whether that of the defendants, or of the plaintiff, or of any other person.

Baji, 101 [115]

No. 46

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether or not negligence occurred in a given case, the

conduct in question must be considered in the light of all the surrounding circumstances as shown by the evidence.

This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are part of, the conduct in question. An act negligent under one set of conditions might not be so under another. Therefore, we ask: "What conduct might reasonably have been expected of a person of ordinary prudence in the same circumstances?" Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence.

Baji, 101-A [116]
[Penciled Note]: Withdrawn.

No. 47

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

Baji, 101-B [117]

No. 48

The mere fact, if it is a fact, that it was possible for a person to avoid an accident that he did not avoid, does not, of itself, justify a finding that he

was negligent or contributorily negligent. If a person exercised ordinary care and did all that an ordinarily prudent person would have done in the circumstances to avoid an accident, she is not chargeable with negligence or contributory negligence.

Baji, 101-E [118]

No. 49

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

Baji, 102 [119]

No. 50

Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances.

To put the matter in another way, the amount of caution involved in the exercise of ordinary care, and hence required by law, increases or decreases as does the danger that reasonably should be apprehended.

Evidence as to whether or not a person conformed to a custom that had grown up in a given locality or business is relevant and ought to be considered, but is not necessarily controlling on the

question whether or not he exercised ordinary care, for that question must be determined by the standard of care that I have stated to you.

Baji, 102-A [120]

[Penciled Note]: Withdrawn.

No. 51

Contributory negligence is negligence on the part of a person injured, which, cooperating with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

You will note that in order to amount to contributory negligence, a person's conduct must be not only negligent, but also one of the proximate causes of her injury.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation.

Baji, 103 [121]

No. 52

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly

or through intermediate agencies or through conditions created by such agencies.

Baji, 104 [122]

No. 53

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

Baji, 131 [123]

No. 54

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issues of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then she has failed to fulfill her burden of proof.

To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent or, if he was, that his negligence was not a proximate cause of the accident, as it is that some negligence on her part was such a cause, then a case against the defendant has not been established.

Baji, 132. [124]

No. 55

In determining whether negligence or proximate cause, or contributory negligence, or any claim or allegation in this case has been proved by a preponderance of evidence, you should consider all the evidence bearing either way upon the question, regard-

less of who produced it. A party is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself.

Baji, 133. [125]

No. 56

The burden rests upon the plaintiff to prove by a preponderance of the evidence the elements of her damage, if any. The mere fact that an accident happened, considered alone, would not support a verdict for any particular sum.

Baji, 171-A. [126]

No. 57

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for future detriment which, although possible, is remote, conjectural or speculative.

However, should you determine that the plaintiff is entitled to recover, you should compensate her for future detriment if a preponderance of the evidence shows such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury in question.

Baji, 171-B. [127]

No. 58

If you should find that plaintiff, Sandra Mae Nihill, suffers from some unfortunate condition which has not been proximately caused by any neg-

ligence on defendant's part, you may not assess any damages for that condition against defendant. However, if negligence on defendant's part has been a proximate cause of aggravating a previously existing disability suffered by said plaintiff, that effect should be considered by you in fixing damages, if your decision on the question of liability is in favor of plaintiff.

Baji, 171-C. [128]
[Penciled Note]: Withdrawn.

No. 59

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they have been given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Baji, 180. [129]

[Endorsed]: Filed April 8, 1958.

[Title of District Court and Cause.]

DEFENDANT REXALL DRUG COMPANY'S REQUESTED JURY INSTRUCTIONS

The defendant, Rexall Drug Company, a corporation, respectfully requests that the following instructions be given to the jury:

Dated: April 9, 1958.

SPRAY, GOULD & BOWERS,
/s/ By PHILIP L. BRADISH,

Attorneys for Defendant Rexall Drug Company. [130]

No. 1

When a distributor purchases a commodity such as cold wave solution from a manufacturer for resale, he is under no duty to make tests for the purpose of discovering whether or not it has dangerous characteristics. [131]

No. 2

You are instructed that the defendant Rexall Drug Company was not an insurer of the safety of the plaintiff. [132]

No. 3

You are instructed to return a verdict in favor of the defendant Rexall Drug Company, a corporation. [133]

No. 4

No matter how negligent the defendants may or may not have been, yet, if any negligence on the part of the plaintiff, Sandra Mae Nihill, however slight, proximately contributed to the occurrence of the accident, then you are instructed that the plaintiff cannot recover in this action on the issue of negligence. [134]

No. 5

You are instructed that on the issue of negligence, that the existence or non-existence of negligence

depends upon the existence or non-existence of legal duty on the part of the person sought to be charged with negligence.

You are further instructed that a person cannot be charged with negligence unless he has knowledge of the existence or non-existence of the facts which give rise in law to a duty. [135]

No. 6

Neither suspicion, nor speculation, nor surmise is evidence and a verdict cannot be sustained where it depends on suspicion, or surmise, or speculation, or guess-work. [136]

No. 7

A person is not required to give any notice or warning of obvious danger.

Shanley vs. American Olive Co., 185 Cal. 552. [137]

No. 8

If in this case the defendant Rexall Drug Company resold Cara Nome cold wave in its original package and at the time of such sale knew of no fault in the product and knew of nothing to place them upon guard against such product, you will find for the defendant Rexall Drug Company and against the plaintiff.

Restatement of Torts, Vol. 2, Page 402. [138]

No. 9

You are instructed that where an intermediate seller repeats any of the matters contained on the manufacturer's label of the product sold, such inter-

mediate seller or dealer does not thereby adopt such statements as his own and is not liable therefor. In this case, if you find from the evidence that Rexall Drug Company merely repeated the matters contained upon the label put out by the manufacturer covering Cara Nome, Rexall Drug Company thereby made no warranties of their own.

Cushman v. McDonald, 23 Washington 2d 348 (1945); Pemberton v. Dean, 88 Minn. 60 (1902). [139]

No. 10

Rexall Drug Company was not the agent of Studio Cosmetics Company either in the sale of Cara Nome cold wave, to the plaintiff, Sandra Mae Nihill, or as to any representations made in connection with the said sale. [140]

No. 11

A distributor who purchases a commodity for resale, the characteristics of which cannot be discovered by ordinary examination or observation, cannot be held liable for alleged negligence in connection with the resale of such commodity by reason of injuries arising out of the defects therein of which he had no actual knowledge. [141]

No. 12

Unless you believe from a preponderance of the evidence that the distributors knew or had cause to know that the cold wave in question was harmful when used in accordance with instructions, or knew or had reason to know of any negligence in connec-

tion with the preparation and marketing thereof, or concealed knowledge of injurious properties, you will find for the defendant distributor, Rexall Drug Company on the issue of negligence.

Quiriri v. Freeman, 98 A.C.A. 240. [142]

No. 13

If the defendant Rexall Drug Company in turn purchased the solution known as Cara Nome Cold Wave from sources which in each instance a reasonably prudent person would have considered reliable sources for the product to be purchased, then such defendant was not guilty of negligence in accepting the representations which came with such product and in turn submitting such representations to the immediate buyer of such defendant. [143]

No. 14

The distributors cannot be held liable in this action for any negligent act or omission on the part of the manufacturer. Before the plaintiff can recover upon any allegation or claim of negligence on the part of any distributor they must establish by a preponderance of the evidence that there was some specific act or omission on the part of the distributor sought to be charged constituting negligence. [144]

No. 15

If in the exercise of ordinary care the Rexall Drug Company had no knowledge that the cold wave solution in question was dangerous or was likely to be dangerous they would not be liable for damages which may have resulted to the plaintiff

by reason of the defective condition or dangerous properties, if any, of said cold wave solution.

Restatement of Torts, Section 402. [145]

No. 16

The plaintiff, if entitled to recover damages herein as to any defendant, will only be entitled to recover as against any particular defendant such damages, if any, as have been shown by a preponderance of the evidence to have been proximately caused by the acts or omissions alleged in the particular cause of action upon which the plaintiff is proceeding against such defendant. [146]

No. 17

A distributor who purchases and sells an article in common and general use in the ordinary course of trade and business without knowledge of its dangerous qualities, if any, is under no duty to discover defects therein.

Tourte v. Horton, 108 Cal. App. 22. [147]

No. 18

The responsibility of determining whether or not a commodity manufactured and placed in ordinary trade channels is foreseeably dangerous when used for the purpose for which it is manufactured is upon the manufacturer. A distributor who purchases from such manufacturer for the purpose of resale has no duty to make an examination or test to discover whether the commodity is dangerous or not. [148]

No. 19

There is no duty in law devolving upon the defendant Rexall Drug Company to have the cold wave solution in question analyzed by chemists and failure to do so does not constitute negligence. [149]

No. 20

The law imposes upon a party injured by another's breach of contract or tort when under all of the circumstances of the particular case it appears a reasonable duty which he ought to perform the act or duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or wilfulness he allows the damages to be unneccessarily enhanced, the increased loss which would have been avoided by the performance of his duty falls upon him.

Mabb. v. Stewart, 147 Cal. 413. [150]

[Endorsed]: Filed April 10, 1958.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impaneled to try the above-entitled cause, find for the plaintiff, Sandra Mae Nihill, a minor, by her father and regular guardian, John Nihill, and against the defendants, Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and Arnold L. Lewis, doing business as Studio Cosmetics Company, and assess her damages in the sum of $48,000.00.

Dated: April 16, 1958, at Los Angeles, California.

/s/ EARLE H. THOMAS,
Foreman of the Jury. [151]

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 14, 1958, at Los Angeles, Calif.

Present: Hon. Fred L. Wham, District Judge.

Deputy Clerk: Irwin Young; Reporter: Ella West.

Counsel for Plaintiff: P. W. Lanier, Jr., and James G. Rourke; counsel for Defendants: Philip Bradish and Robert C. Packard.

Proceedings: For further jury trial. Court convenes at 10.02 a.m. Counsel for both sides and the jury are present. Court orders trial proceed.

Attorneys Bradish and Packard read deposition of Dr. Michaelson.

Attorneys Lanier and Rourke read cross examination of said deposition.

Court and counsel confer out of hearing of the jury.

At 10:50 a.m. Court declares a recess. At 11:02 a.m. Court reconvenes herein. The jury and counsel are present as before. Court orders trial proceed.

Thomas Henry Stark, heretofore sworn, is recalled and testifies further.

Def'ts' Ex. B is marked for ident. and admitted in evidence.

Attorneys Bradish and Packard read deposition of Gerald D'Amour.

Arnold L. Lewis, heretofore sworn, is recalled and testifies further.

Def'ts' Ex. C, D, E, F, and G are marked for ident. and admitted in evidence.

Plf's Ex. 1-A is marked for ident. and admitted in evidence.

At 12:05 p.m. Court admonishes the jury not to discuss this cause and declares a recess.

At 2:02 p.m. Court reconvenes herein. The jury and counsel are present. Court orders trial proceed.

Arnold L. Lewis resumes the stand and testifies further.

Def'ts' Ex. A, heretofore marked for ident., is admitted in evidence.

Defendants rest.

Court and counsel confer out of hearing of the jury.

Court admonishes the jury not to discuss this cause and excuses the jury until 10 a.m., April 15, 1958.

Court and counsel retire to Chambers.

Upon statement of plaintiff Court orders cause dismissed as to defendant Rexall Drug Co. on count one, and dismissed as to defendant Arnold L. Lewis on count two.

Attorney Packard moves the Court for directed verdict as to defendant Arnold L. Lewis on count one. Court denies said motion.

Attorney Bradish, on behalf of defendant Rexall

Drug Co., moves for directed verdict as to count two. Court denies said motion.

Court and counsel discuss admissibility of jury instructions.

It Is Ordered that cause is continued to 9:30 a.m., April 15, 1958, for further jury trial, on the special calendar.

JOHN A. CHILDRESS,
Clerk,
/s/ By IRWIN YOUNG,
Deputy Clerk. [152]

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR JUDGMENT NOTWITHSTANDING THE VERDICT AGAINST ARNOLD L. LEWIS DOING BUSINESS AS STUDIO COSMETICS COMPANY, IN THE ALTERNATIVE RESERVING, IF DENIED, THE RIGHT TO APPLY FOR A NEW TRIAL

To the Plaintiff and to Her Attorneys:

You, and Each of You, Will Please Take Notice that the defendant, Arnold L. Lewis doing business as Studio Cosmetics Company, through his counsel, at a time and place to be designated by the above entitled court, intends to and will move the court for a judgment in favor of said defendant notwithstanding [153] the verdict of the jury in said case. Said motion will be made in the alternative, pursuant to the provisions of Rule 50, subsections (a)

and (b), of the Federal Rules of Civil Procedure, and reserving to said defendant in the event said motion is denied, the right to move contemporaneously for a new trial upon each and all of the grounds set forth in the Notice of Intention to Move for a New Trial filed concurrently herewith. Said motion for judgment notwithstanding the verdict will be made upon the following grounds, and each of them, severally:

1. That said defendant made a motion for a directed verdict, which said motion was not, but should have been, granted.

2. That the evidence fails to show that said defendant was guilty of any actionable negligence.

3. That the evidence fails to show any negligence on the part of this defendant which proximately caused the injuries or damages sustained by the plaintiff, if any.

That said motion will be based upon the evidence submitted at the trial of the herein action, upon the memorandum of points and authorities to be filed and served herewith, and upon all of the pleadings, exhibits, documents, records and files in said action.

Dated this 18th day of April, 1958.

REED, CALLAWAY, KIRTLAND & PACKARD,

/s/ By ROBERT C. PACKARD,

Attorneys for Defendant, Arnold L. Lewis dba Studio Cosmetics Company. [154]

Affidavit of Service by Mail Attached. [155]

[Endorsed]: Filed April 21, 1958.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL MADE CONTEMPORANEOUSLY WITH MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN THE ALTERNATIVE

To the Plaintiff and to her Attorneys:

You, And Each Of You, Will Please Take Notice that in the above entitled action wherein judgment has heretofore been rendered in favor of the plaintiff and against the defendant, Arnold L. Lewis doing business as Studio Cosmetics Company, that said defendant has contemporaneously herewith filed his motion for a judgment notwithstanding the verdict, said motion [160] being in the alternative form and reserving the right to move for a new trial in the event said motion is denied.

You, And Each Of You, Will Please Take Notice that in the event the court does deny the motion for a judgment notwithstanding the verdict, the defendant will contemporaneously herewith move the court for a new trial at such time and place as may be designated by the above entitled court.

Said motion for a new trial will be made upon the following grounds, and each of them:

1. Irregularities in the proceedings of the court by which this moving defendant was prevented from having a fair trial.

2. Irregularities in the proceedings of the jury

by which this moving defendant was prevented from having a fair trial.

3. Irregularities in the proceedings of the plaintiff by which this moving defendant was prevented from having a fair trial.

4. That orders of the court occurred during the trial which prevented this moving defendant from having a fair trial.

5. Misconduct of the jury which prevented this moving defendant from having a fair trial.

6. Accident or surprise which ordinary prudence could not have guarded against.

7. Newly discovered evidence material to the defendant which the defendant could not with due diligence have discovered or produced at the trial.

8. Excessive damages appearing to have been given under the influence of passion or prejudice.

9. Insufficiency of the evidence to justify the verdict of the jury.

10. That the verdict of the jury was against the law.

11. Insufficiency of the evidence to sustain the judgment rendered.

12. Errors in law occurring at the trial and excepted to by this defendant.

Said motion will be made upon a memorandum of points and authorities hereafter to be served and filed, upon affidavits to be served and filed, upon the minutes of the court, the court reporter's report of said proceedings at the trial of this case, and upon all the pleadings, exhibits, records and files in said action.

Dated this 18th day of April, 1958.

REED, CALLAWAY, KIRTLAND & PACKARD,

/s/ By ROBERT C. PACKARD,

Attorneys for Defendant, Arnold L. Lewis dba Studio Cosmetics Company.

Affidavit of Service by Mail Attached. [163]

[Endorsed]: Filed April 21, 1958.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR NEW TRIAL, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

To Plaintiff and to her Attorneys:

You And Each Of You Will Please Take Notice that the defendant Rexall Drug Company, a corporation, through its counsel, at a time and place to be designated by the above entitled court, will move the Court to:

1. Set aside the verdict entered in the above entitled action on April 16, 1958, and the judgment entered thereon, and to enter judgment in favor of the defendant Rexall Drug Company, a corporation, in accordance with the motion for directed [172] verdict made by said defendant at the close of all the testimony herein, on the grounds as stated therein, in that plaintiff failed to prove any cause of action against this moving defendant, and failed

to prove the existence of any express warranty running from this defendant to the plaintiff; upon the ground that plaintiff failed to prove the breach of any express warranty from this defendant to the plaintiff, and upon the further ground that there was no evidence establishing that the breach of any alleged express warranty proximately caused the injuries of which plaintiff complained. Said motion will be made severally upon each and every one of the grounds set forth herein and upon each and every one of the grounds heretofore stated in defendant's motion for a directed verdict.

Said motion will be made in the alternative, pursuant to the provisions of Rule 50, subsections (a) and (b) of the Federal Rules of Civil Procedure, and reserving to the defendant Rexall Drug Company, a corporation, in the event said motion is denied, the right to move contemporaneously for a new trial.

2. In the alternative, defendant Rexall Drug Company will move the Court to set aside the verdict, and the judgment entered thereon, and grant said defendant a new trial on the following grounds:

a) The verdict and judgment are contrary to the law;

b) The verdict and judgment are contrary to the evidence;

c) The evidence in this case is totally insufficient to show any liability on the part of the defendant Rexall Drug Company, a corporation, and there is no evidence to sustain a verdict and judgment.

d) The verdict of the jury herein is excessive

and appears to have been given under the influence of passion and prejudice. [173]

e) Irregularities in the proceedings of the Court by which this moving defendant was prevented from having a fair trial;

f) Irregularities in the proceedings of the plaintiff by which this moving defendant was prevented from having a fair trial;

g) That orders of the Court occurred during the trial, which were objected to by this moving defendant, which prevented this defendant from having a fair trial;

h) Errors in law occurring at the trial and excepted to by this defendant.

Said motion for a new trial will be predicated upon each and every one of the aforesaid grounds severally.

Said motions and each thereof will be predicated upon this motion, upon the memorandum of points and authorities filed contemporaneously herewith, upon all of the pleadings, exhibits, documents, records and files in said action and upon any subsequent written memoranda which may be permitted to be filed by this Honorable Court.

* * * * *

Dated: April 25, 1958.

SPRAY, GOULD & BOWERS,
/s/ By PHILIP L. BRADISH,
Attorneys for defendant Rexall Drug Company, a corporation. [174]

Affidavit of Service by Mail Attached. [175]

[Endorsed]: Filed April 28, 1958.

In the District Court of the United States, Southern District of California, Central Division

No. 258-57 WM

SANDRA MAE NIHILL, a minor, by her father and regular guardian, JOHN NIHILL,
Plaintiff,

vs.

REXALL DRUG COMPANY, a corporation, etc., et al.,
Defendants.

JUDGMENT ON THE VERDICT

This cause came on for trial before the Court and the jury impaneled therein, and the jury found for said plaintiff and against each defendant, and fixed the damages in favor of the plaintiff in the sum of Forty eight thousand dollars ($48,000.00).

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff, Sandra Mae Nihill, a minor, by her father and regular guardian John Nihill, be awarded damages in the amount of Forty eight thousand dollars ($48,000.00), against the defendants, Rexall Drug Company, a corporation, doing business as Cara Nome, and Arnold L. Lewis, doing business as Studio Cosmetics Company, and that the said plaintiff have and recover costs herein taxed in the sum of $177.90.

Dated at Los Angeles, California, April 16, 1958.

JOHN A. CHILDRESS,
Clerk,
/s/ By C. A. SIMMONS,
Deputy Clerk. [183]

[Endorsed]: Filed and Entered April 29, 1958.

United States District Court
Southern District of California

Office of the Clerk

Room 231, U. S. Post Office & Court House

Los Angeles 12, California

SPRAY, GOULD & BOWERS, Esqs.
1671 Wilshire Blvd.,
Los Angeles 17, Calif.

JAMES G. ROURKE, Esq.
First Western Bank Bldg.,
Santa Ana, Calif.

RE: Nihill, etc., v. Rexall Drug Co. etc., et al., No. 258-57-WM.

You are hereby notified that judgment on the verdict in the above-entitled case has been entered this day in the docket.

Dated: April 29, 1958.

CLERK, U. S. DISTRICT COURT,
By C. A. SIMMONS,
Deputy Clerk. [184]

[Title of District Court and Cause.]

ORDER

The above entitled matter having come on for hearing before this Court upon the motions of the attorneys for both defendants for a judgment notwithstanding the verdict, and in the alternative, for a new trial, and briefs having been submitted by all parties, and the Court having considered same and all the files and records herein,

It Is Hereby Ordered, that each of the defendants' separate motions for judgment notwithstanding the verdict, and in the alternative, for a new trial, are now denied, and

It Is Further Ordered, that the judgment of the Court against each of the respective defendants is ordered to stand as entered upon the verdict of the jury.

By the Court:

/s/ FRED L. WHAM,
Judge. [185]

[Endorsed]: Filed and Entered June 26, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant Arnold L. Lewis, doing business as Studio Cosmetics Company, hereby appeals to the United States Court of Appeals for the Ninth Circuit from:

1. The final judgment on the verdict entered on April 29, 1958;

2. The order denying defendant's motion for a directed verdict, entered on June 26, 1958;

3. The order entered on June 26, 1958 denying the defendant's motion for a judgment notwithstanding the verdict; and

4. The order entered on June 26, 1958 denying the defendant's motion for a new trial. [186]

The names and address of appellant's attorneys are: Reed, Callaway, Kirtland & Packard, 639 South Spring Street, Los Angeles, California, and Henry E. Kappler, 453 South Spring Street, Los Angeles, California.

Dated: July 18, 1958.

REED, CALLAWAY, KIRTLAND & PACKARD AND HENRY E. KAPPLER,

/s/ By HENRY E. KAPPLER,

Attorneys for Arnold L. Lewis, doing business as Studio Cosmetics Company. [187]

Affidavit of Service by Mail Attached. [188]

[Endorsed]: Filed July 23, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant Rexall Drug Company, a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from:

1. The final judgment on the verdict entered April 29, 1958.

2. The order entered on June 26, 1958, denying defendant's motion for a directed verdict.

3. The order denying the defendant's motion for a judgment notwithstanding the verdict, entered on June 26, 1958.

4. The order denying the defendant's motion for a new trial, entered on June 26, 1958. [189]

The name and address of appellant's attorneys are as follows:

Spray, Gould and Bowers, 1671 Wilshire Boulevard, Los Angeles 17, California.

Dated: July 17, 1958.

SPRAY, GOULD & BOWERS,
/s/ By PHILIP L. BRADISH,

Attorneys for Rexall Drug Company, a corporation. [190]

Affidavit of Service by Mail Attached. [191]

[Endorsed]: Filed July 23, 1958.

[Title of District Court and Cause.]

STIPULATION RE: APPEAL BOND

It Is Stipulated, by and between the plaintiff and respondent herein, by and through her counsel of record, and the defendant and appellant, Arnold L. Lewis, doing business as Studio Cosmetics Company, through his counsel of record, that a bond in the sum of $55,000.00, shall be sufficient in so far

as Def. Lewis is concerned on and for the appeal cost and supersedeas in the above-entitled action.

Dated: July 12, 1958.

LANIER, LANIER & KNOX and
JAMES G. ROURKE,
/s/ By P. W. LANIER, Jr.,
Attorneys for Plaintiff and Respondent.

REED, CALLAWAY, KIRTLAND &
PACKARD,
/s/ By ROBERT C. PACKARD,

Attorneys for Defendant and Appellant, Arnold L. Lewis, doing business as Studio Cosmetics Company.

It is so ordered. Date: July 28, 1958.

/s/ WM. C. MATHES,
Judge. [200]

[Endorsed]: Filed July 29, 1958.

[Title of District Court and Cause.]

STIPULATION RE: FILING OF APPEAL BOND

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that a bond in the sum of Fifty-five Thousand ($55,000.-00) Dollars shall be sufficient insofar as the defendant Rexall Drug Company, a corporation, is concerned, the appeal cost and supersedeas in the above entitled action.

Dated: This 21st day of July, 1958.

LANIER, LANIER & KNOX,
/s/ By P. W. LANIER, Jr.,
/s/ JAMES G. ROURKE,

Attorneys for Plaintiff and Respondent.

SPRAY, GOULD & BOWERS,
/s/ By PHILIP L. BRADISH,

Attorneys for Defendant and Appellant Rexall Drug Company, a corporation.

It is so ordered. Date: July 30, 1958.

/s/ WM. C. MATHES,
Judge. [201]

[Endorsed]: Filed July 30, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now the appellant Arnold L. Lewis, doing business as Studio Cosmetics Company, and designates for inclusion the entire record and all of the proceedings and evidence in the above entitled action, including:

1. The complaint and summons thereon;
2. The amended complaint;
3. The answer to the amended complaint;
4. The plaintiff's interrogatories;
5. The answers of the defendant Arnold L. Lewis to plaintiff's interrogatories;

6. Memorandum of plaintiff's contentions of fact and law;

7. Pretrial memorandum of Arnold L. Lewis;

8. Trial memorandum of Arnold L. Lewis; [192]

9. Order of April 14, 1958 dismissing Count II of amended complaint as to appellant Arnold L. Lewis;

10. All instructions given by the Court to the jury at the request of either party;

11. All instructions requested by either party and refused by the trial court;

12. Any and all instructions given by the court on its own motion;

13. The verdict of the jury;

14. The judgment on the verdict;

15. Notice of motion notwithstanding the verdict or for a new trial and points and authorities accompanying said motions;

16. Order denying defendant's motion for a directed verdict and defendant's motion for a judgment notwithstanding the verdict, particularly order of June 26, 1958;

17. Defendant's motion for a new trial;

18. Notice of Clerk on entry of verdict;

19. Notice of appeal;

20. Stipulation re appeal bond;

21. The entire stenographic transcript of all of the testimony and evidence received by the Court;

22. Defendant's supersedeas bond;

23. All exhibits introduced in evidence by the

defendant Arnold L. Lewis, save and except the bottles of permanent wave solution and other similar exhibits incapable of being included in the printed record;

24. All exhibits marked for identification and offered by the defendant in evidence and refused by the Court, which are capable of being included in the printed record;

25. All exhibits introduced in evidence or offered in evidence by appellant and which are incapable of being included within the transcript are requested by appellant to be transmitted [193] by the Clerk of the District Court to the Court of Appeals;

26. Designation of record on appeal;

27. No depositions, whether or not designated as exhibits, are to be printed for the reason that the material portions of all depositions were read into the record and will be a part of the reporter's transcript.

Dated: July 28, 1958.

REED, CALLAWAY, KIRTLAND & PACKARD AND HENRY E. KAPPLER,

/s/ By HENRY E. KAPPLER,

Attorneys for appellant. [194]

Affidavit of Service by Mail Attached. [195]

[Endorsed]: Filed July 28, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now the appellant Rexall Drug Company, a corporation, and designates for inclusion the entire record and all of the proceedings and evidence in the above entitled action, including:

1. The complaint and summons thereon;
2. The amended complaint;
3. The answer to the amended complaint;
4. The plaintiff's interrogatories;
5. The answers of the defendant Rexall Drug Company, a corporation, to plaintiff's interrogatories;
6. Memorandum of plaintiff's contentions of fact and law;
7. Pretrial memorandum of Rexall Drug Company;
8. Trial memorandum of Rexall Drug Company;
9. Order of April 14, 1958 dismissing Count I of amended complaint as to appellant Rexall Drug Company;
10. All instructions given by the court to the jury at the request of either party;
11. All instructions requested by either party and refused by the trial court;
12. Any and all instructions given by the court on its own motion;
13. The verdict of the jury;
14. The judgment on the verdict;
15. Notice of motion notwithstanding the verdict

or for a new trial and points and authorities accompanying said motions;

16. Order denying defendant's motion for a directed verdict and defendant's motion for a judgment notwithstanding the verdict, particularly order of June 26, 1958;

17. Defendant's motion for a new trial;

18. Notice of Clerk on entry of verdict;

19. Notice of appeal;

20. Stipulation re appeal bond;

21. The entire stenographic transcript of all of the testimony and evidence received by the court;

22. Defendant's supersedeas bond;

23. All exhibits introduced in evidence by the defendant Rexall Drug Company, save and except any exhibits incapable of being included in the printed record;

24. All exhibits marked for identification and offered by the defendant in evidence and refused by the court, which are capable of being included in the printed record;

25. All exhibits introduced in evidence or offered in evidence by appellant and which are incapable of being included within the transcript are requested by appellant to be transmitted by the Clerk of the District Court to the Court of Appeals; [197]

26. Designation of record on appeal.

No depositions, whether or not designated as exhibits, are to be printed, since the material portions of all depositions were read into the record and will be a part of the reporter's transcript.

Dated: July 28, 1958.

SPRAY, GOULD & BOWERS,

/s/ By PHILIP L. BRADISH,

Attorneys for Appellant. [198]

Affidavit of Service by Mail Attached. [199]

[Endorsed]: Filed July 28, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above entitled Court, hereby certify the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above matter.

A. The foregoing pages numbered 1 to 205, inclusive, containing the original:

Complaint.

Summons.

Amended Complaint.

Answer to Amended Complaint (Rexall Drug Co.) filed 4/15/57.

Plaintiff's Interrogatories.

Plaintiff's Memorandum of Contentions of Fact and Law.

Arnold L. Lewis, etc., Answers to Plaintiff's Interrogatories.

Rexall Drug Co., Answers to Plaintiff's Interrogatories.

Pre-Trial Conference Order.

Separate Answer of Rexall Drug Co. to Amended Complaint.

Separate Answer of Arnold L. Lewis, etc., to Amended Complaint.

Plaintiff's Requested Jury Instructions.

Defendant Arnold L. Lewis Requested Jury Instructions.

Defendant Rexall Drug Co., Requested Jury Instructions.

Verdict.

Minute Order of 4/14/58.

Notice of Intention to move for judgment notwithstanding the verdict against Arnold L. Lewis, etc., in the alternative reserving, if denied, the right to apply for a new trial.

Defendant Arnold L. Lewis' Memorandum of Points and Authorities in support of motion for judgment notwithstanding the verdict.

Notice of Intention of Arnold L. Lewis, etc., to move for a new trial made contemporaneously with motion for judgment notwithstanding the verdict and in the alternative.

Defendant Arnold L. Lewis, etc., Memorandum of Points and Authorities in support of Motion for a New Trial.

Defendant Rexall Drug Co., notice of intention to move for judgment notwithstanding the verdict or new trial, and memorandum of points and authorities in support thereof.

Judgment on the Verdict.

Clerk's notice of entry of Judgment on the Verdict.

Order denying each of the Defendants' separate motions for judgment notwithstanding the verdict, etc.

Notice of Appeal filed by Arnold L. Lewis, etc.

Notice of Appeal filed by Rexall Drug Co.

Designation of Record on Appeal—Arnold L. Lewis.

Designation of Record on Appeal—Rexall Drug Co.

Stipulation and Order re Appeal Bond—Arnold L. Lewis.

Stipulation and Order re Appeal Bond—Rexall Drug Co.

Application and Order extending time within which to file record on Appeal—Rexall Drug Co.

Application and Order extending time within which to file record on Appeal—Arnold L. Lewis.

B. Three volumes of Reporter's Official Transcript of Proceedings had on:

April 8, 1958; April 9, 1958; April 10, 1958; April 11, 1958; April 14, 1958; April 15, 1958 and April 16, 1958.

C. Plaintiff's Exhibits 1 to 34, inclusive.

Defendants' Exhibits A to G, inclusive.

D. Deposition of Dr. Henry E. Michelson.

Deposition of Dr. Frank M. Melton and Charles A. Schmid.

Deposition of Mrs. Carl Carlson.

Deposition of Mrs. Donald Carlson.

Deposition of Sandra Mae Nihill.

Deposition of Dr. Clarence S. Martin.
Deposition of Gerard L. D'Amour.
Deposition of Mrs. Adaline Jorgenson.
Deposition of Mrs. John W. Nihill.

I further certify that my fee for preparing the foregoing record amounting to $2.40, has been paid by appellants.

Dated: December 8, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By WM. A. WHITE,
Deputy Clerk.

United States District Court, Southern District of California, Central Division

Civil Action No. 258-57 WM

SANDRA MAE NIHILL, a minor, by her father and regular guardian, JOHN NIHILL,
Plaintiff,

vs.

REXALL DRUG COMPANY, a corporation, d/b/a CARA NOME REXALL, and ARNOLD L. LEWIS, d/b/a STUDIO COSMETICS COMPANY,
Defendants.

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Honorable Fred L. Wham, Judge—Presiding.

Be It Remembered that a hearing was had in

the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, sitting by assignment, and a Jury, in the Federal Court Room, Federal Building, in the City of Los Angeles, State of California, on April 8, 1958, beginning at the hour of eleven-fifteen o'clock A.M.

Appearances: The plaintiff was represented by her attorneys James G. Rourke, Esq., of Santa Ana, California, and P. W. Lanier, Jr., [1*] Esq., of Fargo, North Dakota.

The defendant, Rexall Drug Company, was represented by its attorneys, Spray, Gould & Bowers, by Philip L. Bradish, Esq., of Los Angeles, California.

The defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, was represented by his attorneys, Reed, Callaway, Kirtland & Packard, by Robert C. Packard, Esq., of Los Angeles, California.

Whereupon, the following proceedings were had in open Court:

The Court: You may call the jury. I take it that both sides are ready to proceed?

Mr. Lanier: Plaintiff is ready, your Honor.

Mr. Packard: Defendants are ready, your Honor.

The Court: Call the jury.

Whereupon, the following jurors were impaneled and sworn:

Ruth H. Swenson.

---

* Page numbers appearing at bottom of page of Reporter's Transcript of Record.

Wyman G. Acton. [2]
Ruth C. Berghoefer.
Frank D. Obenour.
Elmer M. Greening.
Gene D. Whitfield.
Earle H. Thomas.
Wilson L. Venton.
Joseph L. Hancock.
Lorraine Tawam.
Lillie A. Mitchell.
Frances Brayton.

The Court: Now, I take it, that under the Rules, you gentlemen would prefer to have an alternate juror. It will take some time to try the case, I assume. Or——

Mr. Packard: I think, your Honor, it's only in criminal cases where they have an alternate juror.

The Court: Well, that's a mistake. They have them in civil also.

Mr. Packard: Well, I mean if the parties stipulate.

The Court: Let me see counsel at the table just a moment. [3]

(Whereupon, counsel and the reporter approached the Bench, and out of the hearing of the jury the following discussion was had between the Court and counsel:)

The Court: It has been my practice—usually it has been my practice—instead of calling an alternate juror and make them sit through the whole case, that counsel will agree, by stipulation, that if any juror is disabled by illness or other mental

or physical disability, so they could not proceed as a juror, that they would be willing to accept a verdict by eleven jurors.

Mr. Lanier: Or by ten.

The Court: Well, I never decreased it down to ten, always eleven.

Mr. Packard: I'll stipulate to eleven, but I want the record specifically to show that I will not stipulate to any number less than eleven.

Mr. Lanier: It's so stipulated.

The Court: All right.

Whereupon, the following proceedings occurred in open Court: [4]

The Court: The jury will now be permitted to go to lunch and, I assume, you have been in Court enough and on juries enough, to know that it is quite improper for you to talk about the case among yourselves or anybody else, or permit anybody to talk to you about the case or in your presence if you can avoid it. Be very careful about that and keep your mind free and clear of any possible outside influence until you've heard all of the evidence, so that you can confine your attention, when the time comes for you to consider your verdict, strictly to the evidence in the case under the law as given to you by the Court. Now you may be permitted to separate. Now, then, you gentlemen, do you want to argue that matter that we were talking about, before we go to the jury, that Motion, Mr. Packard?

Mr. Packard: Yes, I would like to be heard.

The Court: Well, suppose that you gentlemen come in, if you can get around to it, by a quarter of two.

Mr. Packard: That will be all right. [5]

Mr. Lanier: That will be satisfactory, your Honor.

The Court: And the jury will be back in the jury room until called after two o'clock. Get back at two and then we will call you as soon as we are ready for you.

(Whereupon, the hearing was adjourned until 2:00 o'clock P.M. [6]

Afternoon Session
April 8, 1958

In Chambers 1:55 o'clock P.M.

(Pursuant to adjournment, the following proceedings were had in Chambers, in the presence of the Court and all attorneys of record, and the reporter present:)

The Court: Have you your Motion in writing?

Mr. Packard: No motion in writing.

The Court: All right then, suppose you proceed.

Mr. Packard: First of all, before I make a Motion, your Honor, I would like to have a stipulation between counsel that, throughout this trial, at any time that matters may be taken up in Chambers, in the absence of the Jury, that any Motions taken up, or any matters which are heard in Chambers may be deemed held in open Court, in the absence of the jury. Is that agreeable—may we stipulate to that?

Mr. Lanier: I'm entirely willing to leave that to the Court. I have no objection to so stipulating. [7]

Mr. Packard: Well, the point I'm getting at, rather than go out and sit in Court and make my Motion in the court-room, in the absence of the jury, I've had occasions in my practice where someone will question as to whether a particular Motion is properly made when it was made in Chambers and not made in open Court, and I want—all these proceedings are held in Chambers, and this Motion which I intend to make is a Motion which should be made in open court in the absence of the jury and I don't want any question raised that we are not in open court.

Mr. Lanier: I'll so stipulate.

The Court: I've heard of such things, but nothing like that was ever pulled on me in any of my practice.

Mr. Packard: Then I do have a stipulation, gentlemen, that all matters, held in Chambers, may be deemed in open court unless somebody calls my attention to the contrary.

Mr. Lanier: It's okay. [8]

Mr. Packard: May the record show, your Honor, that at this time the Jury has been sworn to try this cause; that prior to the calling of any witnesses or the taking of any evidence in the case, the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, moves the Court for a dismissal as to the second cause of action of plaintiff's amended complaint, upon the ground that said second cause of action fails to state a cause of action as purported therein. I call the Court's attention particularly to the fact that there has been a fail-

ure on the part of plaintiffs, in their second cause of action, to make any allegation, or to allege, that they had given any notice to the defendant, Arnold L. Lewis, or to any of the defendants; that they are claiming a breach of warranty, either express or implied, oral or written. There has been a complete failure on the part of plaintiff to allege in her complaint that they have given notice to the manufacturer—the distributor—of this particular product which they have alleged to be a cold wave solution called "Cara Nome", and that under—I believe it's 1769 of the Civil Code of the State of California, and it's my understanding that [9] that has been adopted from the Uniform Sales Act and is in force and effect also in the State of North Dakota—that the law provides that when action is brought, based upon the breach of a warranty, that——

The Court: Either express or implied?

Mr. Packard: Either express or implied. —that the buyer must give notice, within a reasonable time, to the seller, of the alleged or claimed warranty upon which they are relying. And I pointed out to the Court the case of Vogel vs. Thrifty Drug Store, which is in 43 Cal. 2nd, reported at page 184. The Court, in discussing the Uniform Sales Act, also in discussing Civil Code, Section 1735, under which causes of action, suits for warranty are permitted, then discusses the pleadings, and in this case the Court held that statutory requirement of notice must be given by the buyer charging breach of warranty. Then citing Civil Code 1769, which I referred to. It's imposed as a condition

precedent to right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach. I may state to the Court [10] that this is a most recent case in our State on this particular point——

The Court: Give me the reference again please.

Mr. Packard: (Spelling) V-o-g-e-l—Vogel vs. Thrifty Drug Store, 43 Cal. 2nd 184. And, of course, this case is a decision by our highest State Court—the Supreme Court—and it shows that a Petition for Rehearing was denied on July 28, 1954——

The Court: I notice in one of the briefs, that you cite CA 2nd——

Mr. Packard: That's our District Court of Appeals, and our trial court is the Superior Court, and then a case is appealed from the Superior Court to the District Court of Appeals, and then you may petition for a hearing in the Supreme Court. In other words, I realize that your Honor is——

The Court: I looked under Circuit Court of Appeals——

Mr. Packard: Right behind you are our California Appellate Reports, and that's our intermediate report, and I know in [11] New York State their Supreme Courts are trial courts I believe, and sometimes people are confused, but the Supreme Court is our highest court.

The Court: I believe their highest court is the Court of Appeals, isn't it—in New York?

Mr. Packard: I think so, yes, sir. But, this case, your Honor, has thoroughly discussed this

question of notice of alleged breach of warranty, and it goes on and states that——

"The clear and practically unbroken turn of authorities established the doctrine of the requirement of notice to be given by the vendee charging breach of warranty as imposed as a condition precedent to the right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach."

And then they give citations, or cases, from Oregon, Connecticut, so forth. It says,

"The giving of such notice must be pleaded and proved" by the purchaser seeking to recover or defend for breach of warranty. And it cites 77 Cal. Corpus Juris Secundum, Vol. 66. I don't know whether your [12] Honor has read the case or not, but I think it very thoroughly points out further that the burden is upon the one claiming the breach of warranty to plead and prove notice within a reasonable time. Now, there's a case that's cited here, Whitfield vs. Jessup—a 1948 case—it's in 31 Cal. 2nd, 826. It so happened, your Honor, that that particular case was tried by my firm, and it was the first case on this particular point, of the giving of notice. There was a question as to, there must be reasonable notice, and in that case this young lady had been drinking milk put out by the Jessup Farms and she contracted undulent fever, and she didn't discover this undulent fever for a matter of six or eight months and then she wrote a letter stating that she contracted this undulent fever and that she was holding them responsible,

and so forth. The evidence in the case showed that she had been to many doctors and was under the impression she had influenza. It varied. But nobody could diagnose her condition. So the Court, in that case, said it was a question of fact as to whether the notice was timely because, after all, she didn't know she had undulent fever. We were granted a non-suit, it so happened, in the case, and went up on appeal, [13] and the Appellate Court said it was a question of fact under this particular case inasmuch as she didn't know what happened to her——

The Court: They sent it back for trial?

Mr. Packard: For trial. But there wasn't a question of giving notice, as in this case. They haven't given any notice of any kind. They've alleged in their complaint that they are claiming permanent damage to her hair by reason of this——

The Court: Does the complaint indicate when the material was used?

Mr. Packard: Yes. The complaint alleges that on February 5, 1955, she purchased from the Kensal Drug Company of Kensal, North Dakota, a bottle of said product of Cara Nome, and they go on to state that she used that; that she mixed it up as it said on the instructions and, that, as a result of the use of this particular product, she sustained damage and injuries. Now, that, of course, was three years ago, and I believe the case—I'm not certain whether this case discussed the particular [14] point, but the purpose of the Code Section, our Civil Code, for the giving of notice is two-fold,

so that producers and manufacturers of products similar to this product, they are saying here, have an opportunity to maybe withdraw from the shelf——

The Court: What does the Code itself say?

Mr. Packard: Can I get a Code, your Honor? I think there is one out here——

Mr. Bradish: May I just inject into the record the fact that the initial complaint in this matter was first filed on February 19, 1957, and that the amended complaint——

The Court: That was the first notice any of you had, I suppose——

Mr. Lanier: Oh, no, your Honor, no.

Mr. Bradish: (Continuing) The complaint was first filed on February 19, 1957, and the amended complaint bears a date of affidavit of service on the attorneys then of record, of April 1, 1957. So, insofar as the pleadings are concerned, and insofar as the official court records reflect, that [15] was the first notice——

The Court: What was the filing of the first pleading, the month——

Mr. Bradish: February 19, 1957, which was some two years after the alleged incident took place.

Mr. Packard: 1769 of our Civil Code, reads as follows:

"Acceptance Does Not Bar Action for Damages." In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer

shall not discharge the seller from liability in damage or other legal remedy for breach of any promise or warranty in the contract to sell, or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor". That is our Code Section and that is followed after the Uniform Sales Act.

The Court: Is that the same as your Statute?

Mr. Lanier: The same as ours, your Honor. [16]

Mr. Packard: And, then, like I stated to your Honor, these cases—or case—the one I stated to you that our firm handled was the first one in California on the question. We got a non-suit. The Judge held that there was not reasonable notice given, because six months had elapsed, but the Appellate Court held that this lady didn't know that she had this condition until about six months had elapsed, and so, therefore, it was a question of fact for the jury to determine whether the notice was reasonable, but in our case at bar—this case—there has never been any notice alleged in the complaint as having been given. They've alleged in their complaint, when they filed their complaint, that there was a breach of warranty, but they haven't alleged that they have ever given notice. Like I state, your Honor, the purpose of the law is so that the manufacturer can take whatever steps are necessary to ascertain and determine these facts, and I feel that a Motion to Dismiss should be

granted. The Court, I notice here, your Honor, states:

"One of the purposes of the provisions in the Uniform Sales Act was to * * * the harshness for the common law rule in some states that the mere acceptance by, or passage of, title to the buyer of the goods constitutes [17] a waiver of any and all remedies for breach of warranty, at the same time gives the seller some protection against stale claims by requiring notice. The Sales Act, on its face, clearly applies to the sales of foods—this is a food case—but certainly there is an implied warranty that the food is fit for human consumption under the Statute dealing with the law of the sale of goods. It is accepted for the sale of foods",—well, there's no question there's a sale of goods here—and comes within 1735 of the Civil Code, and 1769 providing that notice must be given, and I submit to the Court that I feel this case is controlling.

The Court: Does Rexall join in the motion?

Mr. Bradish: Yes, I do, and I would like to cite the court to a couple more cases which seem to be in point. One case is where the buyer of a safe failed for a period of fifteen months to give notice to the seller of his intention to hold the seller for breach of warranty and the court held that, as a matter of law, fifteen months was unreasonable and precluded the buyer——

The Court: I can't remember your associate's name. [18]

Mr. Packard: Bradish.

Mr. Bradish: Like "Radish" with a "B" in front.

The Court: All right, Mr. Bradish, I'll try to remember that.

Mr. Bradish (Continuing): This is a fifteen months' period which the Court held, as a matter of law, was unreasonable, and precluded recovery by the buyer. Then there is a recent case——

The Court: What was that citation?

Mr. Bradish: Davidson v. Harrington, Hall, Marvin Safe Company, 131 Cal. App. 2d. Supp. 874, and it is also cited in 280 Pac., 2nd, 549. Then there is a 1956 case entitled Burkett v. Dental Perfection Company, 140 Cal. App. 2nd, 106, which says that where the complaint contains no allegations concerning notice of a breach of warranty of sale, this is——

The Court: What is that case——

Mr. Bradish: 140 Cal. App. 2nd, 106. ——this is fatal to an action for a breach of warranty. Now that case is subsequent to the Vogel case which I understand was decided in 1955, and merely confirms the ruling in the Vogel case.

Mr. Packard: May I state this further, your Honor. The case of Bailey Trading Company vs. Levy. This case is cited in the Vogel-Thrifty Drug Case. The case states—and that is reported in 72 Cal. App. at 339—and it states that "Where an action is founded on a statutory right, or a right deducible wholly from statute"—and that's the situation here—"the plaintiff must, by his complaint, bring himself squarely and clearly within the terms of the provisions of the Statute upon which he relies, or must rely, to state a cause of action. In other

words, where a party relies upon a general or a statutory warranty for a recovery, the terms thereof, and the facts from which the damages for its breach are to be inferred, must be set forth with reasonable certainty." In other words, they hold that a person, when relying upon a statute must plead themselves within the statute, and that is the very point we are claiming here, that they had failed to plead themselves within the statute in that they had failed to allege that they had ever given at any time any notice to any of the defendants in this action that they were relying upon a breach of warranty, as provided for under our Code, and I submit to the Court [20] that a Motion to Dismiss should be granted as to that cause of action based upon the second cause of action.

Mr. Lanier: May it please the Court. First of all, let's get back in the Federal Court. I want to answer counsel four ways, one very briefly. The Vogel case and all the other cases in the State Court—while I don't think this has anything to do with this lawsuit, but I want to state it briefly—pleading in the State Court of California has nothing to do with pleading in the Federal Court—rules or statutes or anything else. But, No. 1, all of the cases——

The Court: Of course substantive law does; the statutes of course are substantive law.

Mr. Lanier: The proof eventually, which will have to come out during the trial of course will have to conform to the statute, but the pleading of course has nothing to do with California decisions or statutes. They should be Federal decisions. But,

No. 1, all of these cases, your Honor, are between seller and buyer. The statute itself is between seller and buyer. The local druggist sells. To have the action against the local druggist, who is the [21] seller of the product, the notice under the statute must be given in order to hold him. This, of course, isn't between seller and buyer. This is a warranty, not between a seller and a buyer, but between a manufacturer and a buyer. I don't even think the statute even applies to it, but I'm not going to argue that at any length at all because I don't think it's necessary. Second, there is a pre-trial conference order made here, as a matter of fact dictated and submitted by the defendants in this case. No question of improperness of pleading, and a legal question raised in a pleading is raised at the time of the pretrial conference order, hence it would come too late to raise it at this time. There is a question raised in the pretrial conference order whether, as a matter of fact, they had reasonable notice or not, but not as a matter of law insofar as the pleadings are concerned. I think that's material. No. 3, and the thing that I think is controlling. That, under Federal Rules of Civil Procedure, Rule 882 is very clear. Of course this has been uniform and universal throughout. However, 882 of the Federal Rules, and as further discussed in Section 441, Barron & Holtzoff—no that's under Section 255 of Barron & Holtzoff. The section of course, 882 of the Federal Civil Rule, states only "A short and plain [22] statement of the claim showing that the pleader is entitled to relief is required." "The intention of the rule"—this

is Barron & Holtzoff and universal throughout the Federal Courts—"The intention of the rule is clearly to avoid technicalities, fair notice and general indication of the type of litigation involved." The liberal construction under 8F that no relief can be granted, is only a question where, if a person should grant a motion such as now has been made by counsel, the only place, which is discussed in Barron & Holtzoff, that such a motion could be granted, is where it becomes obvious under the pleadings that regardless of what the testimony was, no relief could be granted under any possible given set of facts. It's just that clear and just that simple. Under the new rule, the only requirement of any pleading is that it sets forth in a general way what the theory of the lawsuit is and what it's about. Now this goes further. In other words, my position on that is this, your Honor, counsel is arguing a matter of law, not a matter of pleading, he is arguing a matter of proof, not a matter of pleading. Had we only alleged in our complaint (1) "Defendant is guilty of a breach of warranty," we would have sufficiently alleged all necessary allegations under 882, but we went farther than that. We even specifically pointed out that they had advertised and [23] that we relied upon that advertising. The mere fact that we don't state in there that we have given notice is totally immaterial insofar as the pleadings are concerned.

The Court: Well, let's go back to the substantive law just for a moment. What position do you take on the necessity of notice?

Mr. Lanier: I think the necessity for reasonable notice is unquestionable under the statute. I think our proof is going to have to show that the notice given was reasonable.

The Court: Don't you think that anything you have to prove like that should be stated—pleaded I mean—as part of the case?

Mr. Lanier: No, I do not, your Honor. I don't think that under 882 under the Federal Rules of Civil Procedure, which is the pleading rule itself, I don't believe we have to plead anything but breach of warranty. I don't think that we have to say in what way; that they advertised; that we relied upon it; that it was not fit for the general purpose for which it was sold, whether it's an express warranty or an implied warranty. It just isn't necessary under the Federal pleadings. It's just like the negligence cases, you can come in now and say "he done it," "he done it [24] negligently."

Mr. Bradish: If 882 was to have that meaning, it would in essence state that the Federal Court would not have to comply with the substantive law of the jurisdiction wherein they were sitting——

Mr. Lanier: Counsel, if I might finish first.

Mr. Bradish: All right.

Mr. Lanier: I listened all the way through on yours. If I might finish——

Mr. Bradish: I thought you were. I'm sorry.

Mr. Lanier: If we were worrying about substantive law, we are worrying about a question of proof and compliance of what is necessary, and there, of course, we would be fatally effective. Were we not

to have ever given them any notice and brought a lawsuit three years later, of course we would be fatally defective, but that is a matter of substantive law. This is a matter of procedural law. This is pleading which is set forth by the new Federal Rules of Civil Procedure, and they can bring these cases all they want to, they can't give me a single case in Federal Court where, under the pleadings— [25] any pleadings have to be more specific, unless I'm wrong, and they don't and they can't. Now, let's suppose, in going to the final point on this, your Honor, let's suppose that we weren't specific about it, let's suppose that the Federal Courts are going to require the technicality of stating in a pleading, which is completely out of line, that we had given notice. Now then, even after judgment was entered, to conform to the proof at the close of the trial the Court certainly, under Rule 15, has the power to allow the amendment to include it. Let's go back again to Barron & Holtzoff on that for a moment. Section 441. Under the rule "Leave to amend should be granted freely when justice so requires, and the adverse party will not be prejudiced thereby. The right to amend a pleading by leave of Court is controlled by this Rule," and here is what I want to point out to the Court, "and State Statutes or rules have utterly no application. In ruling on the Motion to Dismiss, if it appears that the objection could be obviated by amendment, the Court may permit the amendment and deny the motion." Now that is my four points, your Honor.

The Court: My understanding of the Rules of

pleading in the Federal Court is not quite as simple as you conclude Mr. Lanier. Rather, that the pleading, where there's any question raised, by Motion to Dismiss, or otherwise, that the pleading should, [26] either on its face or by amendment, if they want to amend, show all the essentials required in order to prove the case. In other words, if there is a notice required by substantive law, I think you ought to plead it. In other words, where it's brought to the attention of the Court—I think it is true that there's been no motion to dismiss—and the question comes up during the trial, I think you would be permitted to amend and to comply with the proof; but here it's brought to the attention of the Court as a matter of substantive law, and it's not in your pleading, and I'm inclined to think that if you would want to rely on that, as I assume you do, that you should amend your pleading to comply to that rule of substantive law. Here is an example of what I'm getting at, Mr. Lanier. In our State and in negligence cases, the plaintiff, in order to recover at all, has to allege and prove not only negligence on the part of the defendant, but freedom from contributory negligence on the part of the plaintiff. When the Federal Rules were first adopted, the plaintiffs thought, well, now, contributory negligence is made an affirmative defense by the rules so I will not need to allege that anymore. Well, a case came up on a Motion to Dismiss, just like this, and the pleader stood on his complaint, he hadn't alleged freedom from contributory [27] negligence. I held that it was a matter of substantive law under the law of Illinois, not a

matter of procedure at all, and that since it was a matter of substantive law it had to be pleaded in order to make out a case. In other words, you can prove all day in Illinois if you want to that the defendant is negligent. Unless you also prove that the plaintiff was free of contributory negligence, you can't recover because that's the law of the state, and here apparently it is that the notice is an essential part of the case and, therefore, I would suggest, if you want to be able to put in the proof, now that it has been called to the attention of the court, that there was a notice given by your client and that you amend your pleading to comply with that——

Mr. Packard: May I be heard just briefly?

The Court: I don't think there is much further to be said.

Mr. Packard: In this case, it goes on to say, and it's very short—"It is settled in this State the implied warranty of fitness imposed by sub-division (1) of Section 1735, the Civil Code, applies to the sale of food of the type here involved. The plaintiff urges that she should have been permitted to file her proposed amendment to separately state the implied warranty theory, and that [28] in any event all of the facts necessary to support a recovery upon that theory, as well as upon the theory of negligence, was set forth in the amended complaint upon which they were at trial."

And the Court says:

"But in making this argument plaintiff overlooks an element essential to stating a cause of action for

breach of the implied warranty. In other words, an allegation the plaintiff gave notice of the breach to defendant within a reasonable time." Now, I feel that to permit them at this late date to amend would be too late and that the motion as to that cause of action should be dismissed.

The Court: I disagree with you on that.

Mr. Lanier: Your Honor, so I can get my record complete over here. First of all, may the record show an exception to the ruling of the Court; and, secondly, I now move the Court to amend the amended complaint herein and particularly under cause of action No. 2, paragraph 1, of said complaint, to put a semicolon at the conclusion of the sixth and last line of said paragraph 1, and to add the following sentence: [29] "that reasonable notice of said injury was given to the defendants herein."

Mr. Packard: Let me be heard before you rule, your Honor.

The Court: All right.

Mr. Packard: Well, I feel that that is uncertain. Of course, we're not in a position to make a motion at this time to make more definite what they mean by "reasonable notice"; also uncertain as to which defendants or any defendants they gave notice. I think if they are going to make proof at the trial of this action that they gave notice, they certainly must at this late date know the date on which they gave the notice and to whom they gave notice, and I think if the Court is going to permit them to amend their complaint by interlineation at this late date, that we at least should have the benefit of

knowing when they claim notice was given and to whom notice was given.

The Court: Any reason why you can't give that information?

Mr. Lanier: No, there isn't any reason, your Honor. The only thing, [30] I'd like the record to show the type of spurious objection that this is, because counsel and his defendants are just as aware of when the notice came as we are. There's nothing new and surprising in this at all. They have the letters from us. They have retained lawyers in North Dakota in the year 1955. Not '56, '57 and '58. They retained them. We sent in '56, even, two years ago, at their request, we sent the plaintiff to their specialists, one of the best in the country, Dr. Michelson of Minneapolis. All the notice is there, and they have every bit of that record that we do.

Mr. Bradish: If the Court please, the first time any mention of breach of warranty was involved in this case was in April of 1957 when the first amended complaint was filed. The complaint itself filed in January '57 made no mention of warranty at all.

The Court: Well, so far we're right on our procedure. I will require you, Mr. Lanier, to give them the date of the first notice you have given.

Mr. Packard: And after that is inserted we may have further motions. [31]

The Court: Well, the motions are coming awful late.

Mr. Packard: I believe these motions, your Honor, are motions that can be heard at any time,

even on appeal, and this goes to—like in our State Court—a general demurrer. They haven't stated a cause of action, and in the Federal Court I understand the procedure is to make a motion to dismiss because the complaint fails to state a cause of action.

The Court: I'm not going to hear them now.

Mr. Packard: Then you're refusing to hear my motion to dismiss?

The Court: I don't know what your motion is, but the motions are coming too late. The jury is impaneled and I want to proceed with the jury trial.

Mr. Packard: Well, I would like to make my record, and is counsel, before we proceed with the trial, going to allege in the complaint when this notice was given? I would like to make my record on this case, your Honor, so I'm protected. [32]

The Court: I am requiring him to give you that information.

Mr. Packard: Are you giving him leave to amend his complaint at this date to so insert by interlineation the date upon which notice was given? I'd like to have the Court rule.

Mr. Lanier: I believe the record shows that the motion was granted and he is asking the court to now ask me to give you the dates and I will now give them to you.

Mr. Packard: Well, I don't feel that, for the record, it's sufficient for counsel merely to give me dates. I think that it should be in the record as to——

The Court: Well, make your offer and I'll answer it.

Mr. Packard: Well, your Honor hasn't ruled upon my motion yet——

The Court: Your motion is denied.

Mr. Packard: (Continuing) ——to dismiss on the ground that they have failed to allege that there has been any notice given, or alleged in their complaint as to the second cause of action. [33]

The Court: The court has denied the motion but required the plaintiff to amend its pleading to show what this allegation is concerning such a notice. Now he has amended his pleading to show an allegation of reasonable notice to, I assume—he said to the defendants—he means to each of the defendants. Now then, in addition to that I have asked him orally, and to orally give you the information that you asked regarding dates, and I think that's all that the situation requires.

Mr. Packard: Then, as I understand, the complaint—I would like to know what he is putting in his amended complaint at this time.

Mr. Lanier: It's dictated into the record, counsel.

Mr. Packard: All right. Now, I would further like to make a motion for dismissal of this action as to the defendant, Arnold Lewis, doing business as Studio Cosmetics Company, on the ground and basis that there is no showing of any privity of contract and the complaint, upon its face, alleges that plaintiff purchased from Kensal Drug Company, Kensal, North Dakota, a bottle of said Cara Nome; that they have not alleged on the [34] face of the complaint

any fact which would show that there was any privity of contract between the plaintiff and the defendant, Arnold Lewis, doing business as Studio Cosmetics. As you will recall, counsel when he just stated his four grounds stated that they are not claiming any privity; that they went into this drug store in North Dakota and that this provision of our civil code and the Uniform Sales Act relative to Section 1735 of our Civil Code, providing that there is certain obligations upon a seller to a purchaser and so forth, he said that he isn't claiming that any of the defendants in this action were sellers. Now if that's his position — and I feel from reading the complaint in this action, it's quite evident that the defendant Arnold Lewis did not sell this product to the plaintiff—we are entitled to a dismissal as to the second cause of action based upon warranty in that it's quite evident there is no privity of contract between the parties, and certainly an action based upon warranty has to stand upon a privity between the parties, or a contract to sell between the parties, and I submit to the Court that our motion to dismiss should be granted upon those grounds. [35]

Mr. Lanier: Now, counsel is asking me to plead a conclusion of law which is only going to be a question of fact from the evidence that comes out and the decisions as to what constitutes—what he is asking me to do now is to plead a conclusion of law, that there's privity between the parties.

Mr. Packard: No. He alleges right in the complaint that the plaintiff purchased from Kensal

Drug Company, Kensal, North Dakota, a bottle which had been obtained from defendants. "Which had been obtained from the defendants," now that certainly implied that they had obtained a solution from the defendants who are before the Court here. They haven't sued Kensal Drug Company of North Dakota. He just stated that in his argument, that we should not invoke the sales act——

The Court: Have you got your motion made?

Mr. Packard: Yes.

The Court: Your motion is denied.

Mr. Bradish: Your Honor, may I have—will Mr. Lanier be kind enough—— [36]

The Court: I have a very deep feeling that you are taking unfair advantage of this Court by not ironing all of this out at the preliminary hearing on this thing when Judge Mathes had this all in mind and had an opportunity to consider everything. I don't believe that this is the time to catch this court unapprised of what the issues are, almost, and make all of these technical or meritorious motions you like——

Mr. Packard: Well, I want the record to show that I do not consider I'm making technical—but I'm making my motions based on the law, and I feel that they are meritorious and I feel——

The Court: If you think you are going to try this case by trying to catch this court up on errors, why I want you to be just a little fair about it all.

Mr. Packard: I may state to the court — maybe it's my fault—that the first time I looked at this file is when I got it ready for trial. My clients wanted

me to try it and someone else was handling it, and I feel that I'm entitled to raise all the legal matters—— [37]

The Court: Weren't your men represented in that pretrial hearing?

Mr. Packard: Yes, but I mean the Court has indicated——

The Court: Well, you are the trial lawyers, and you come in here and raise all these questions, that ought to be raised preliminarily, at the trial, and I don't think that's right and I don't think it fair to the Court and I don't think it's fair to your client even.

Mr. Packard: Well, I'd like to state——

Mr. Lanier: It certainly isn't fair to opposing counsel so far as I'm concerned.

Mr. Bradish: Gentlemen, may I just please have, in compliance with your Honor's request, may I have Mr. Lanier read into his amendment to this complaint the dates upon which notice was given.

The Court: No. I won't require him to put it in the amendment. I'll require him to give you the date. [38]

Mr. Lanier: The first notice was given to you July 5, 1955.

Mr. Bradish: Given to whom?

Mr. Lanier: The letter is addressed to Rexall Drug Company, Department F, 8480 Beverly Hills, Los Angeles 54, California.

Mr. Packard: Did you ever give notice to Arnold Lewis at any time, sir?

Mr. Lanier: The next is November 21, 1955, to

Mr. Walter D. O'Connor, of the law firm of Topless, Harding, Wagner & Gliden, 3440 Wilshire Boulevard, Los Angeles 5, California.

Mr. Bradish: May the record show that that is not a law firm, and that is not a defendant in this action.

Mr. Lanier: In re Sandra Nihill. In response, and also on September 7th—in response to a letter from them stating that they represented Rexall Drug Company and Cara Nome products and had received the notice—and that's from an attorney—stating that he represented them, from Jamestown, North Dakota, on December 3, [39] 1955. Now, if these people don't represent you that of course is a matter of proof. We have dealt in good faith with them. I don't know anything about that. A letter from Rexall Drug Company of August 16, 1955, signed by a Miss Roney, reference to Nihill vs. Rexall Drug Company, referring to our letter of August 8th——

The Court: Do you have anything to Lewis, Mr. Lanier, or anyone representing him?

Mr. Lanier: So far as I know only that it comes from Cara Nome, but from Lewis themselves, no, except by indirection that they indicate that they are part of it, but not from Studio Cosmetics direct. Our correspondence and notices were between us and Rexall.

Mr. Bradish: You say there was a letter on July 5, 1955?

Mr. Lanier: That's the first one.

Mr. Bradish: And is that based upon any receipt

of registered mail or anything like that, or is that just based upon a copy that you have—— [40]

Mr. Lanier: Based upon a copy right now. We wrote you. You're asking for the dates and I am telling you.

Mr. Packard: I don't wish to take up the Court's time and I feel that the Court felt—we haven't even commenced this case—I am raising certain issues in the case that I should not properly raise and I just want the Court to know that I am making these motions in good faith and I feel my grounds is good and I feel that the Court has already taken the position that I am trying to raise every technical ground and take people by surprise, which I am not, because in the pretrial order it shows that one of the things we are relying upon is this question of notice and I feel that that's vital to their case and I feel that——

The Court: It apparently was considered an issue in the pretrial hearing.

Mr. Packard: Beg pardon.

The Court: It was at issue in the pretrial hearing, made one of the issues in the case. [41]

Mr. Packard: It was one of the contentions, yes, that's right.

The Court: One of the issues.

Mr. Packard: Yes, that's right, but I am submitting to the Court that the fact that it was made one of the issues certainly doesn't mean that we can not rely upon the pleadings.

The Court: I think he is entitled to amend.

Mr. Packard: Very well. I feel that there will be other times when this matter will be raised.

(Whereupon, the Court, Counsel for the respective parties, the reporter and clerk proceeded to the courtroom, and the following proceedings were had in open Court:)

The Court: State the case for the plaintiff.

Mr. Lanier: May it please the Court, Members of the Jury panel. It is now my opportunity to be able to state to you under our jurisprudence what it is that we expect to prove so that you can better follow the case as you go along. I want to give you a brief summary of what it [42] is that we expect to prove so that you, as jurors, can follow the testimony better and apply that testimony to the law which later will be given you by the Court. Now, first of all, I am P. W. Lanier, Jr., from North Dakota, where I practice law in Fargo, North Dakota, and seated at my counsel table with me is James G. Rourke, who practices law in Santa Ana, California, and is associated with me in representing Sandra Nihill. Sandra Nihill is the little girl seated there in the middle, in the front row. Her mother, Mrs. Nihill, is on the far right. Sandra Nihill is the plaintiff in this case. The testimony will show you that Sandra Nihill lives on a farm about three and a half miles out of a little town in North Dakota, known as Kensal, North Dakota, a town of approximately three hundred or three hundred and fifty people. The proof will further show that there is located within the town of Kensal, North Dakota, a Rexall Drug Store. It has been

there for several years. The proof will show that Mrs. Nihill and her daughter Sandra are acquainted with that Rexall Drug Store and have bought drugs and cosmetics from Rexall—the Cara Nome line—there for some good time. The proof will show that Rexall Drug Stores—that the Rexall Company—is a Delaware corporation having its [43] principal office here in Los Angeles, and handles Cara Nome cosmetic products; that one of them is a pin curl home wave under the tradename of "Cara Nome" and sold by Rexall Drug Company. The proof will show that Rexall Drug Companies under a national advertising program advertised Cara Nome cosmetics, which, among them, is this pin curl home permanent as one of their Rexall products. The proof will show to you that at the time when Sandra was thirteen years of age, in about February 5, 1955, that Sandra and her mother went to the Rexall Drug Store in Kensal, North Dakota where they bought a Cara Nome Rexall Pincurl Home Wave; that they bought the set and the kit, as the testimony will show you, in reliance upon the national advertising that it was safe, that it was faster, that it was easier, and that, upon that reliance, and depending upon the Rexall name and the Cara Nome, they purchased it. The proof will show you that they took it home and a Mrs. Briss—at that time, her husband has since deceased—that a Mrs. Briss, who had applied many home waves to the neighbors around in this area, in a rather closely-knit community, that she came over in the evening and that Mrs. Nihill and her daughter Sandra and Mrs. Briss

were together [44] at the time that the wave was applied; that Mrs. Briss primarily applied the wave and that Sandra and her mother, Mrs. John Nihill, assisted in the timing; that it was done in the kitchen of their farm home; that there was an electric clock upon the wall. The testimony will show you that the directions within the Rexall Cara Nome kit were carried out meticulously to the "enth" degree; that all the timing was done carefully and that primarily it was Mrs. John Nihill's function and Sandra herself also assisted in it. The proof will show you that Sandra at the time was in the eight grade; that she had just about, a month before, had pictures taken of her for her eighth grade picture by a photographer who come around in that rural area of our country and takes group and grade school pictures for graduation, and that picture of how Sandra was, about a month before the application of the wave will be shown and will be put into evidence for you. Also the pictures taken immediately thereafter and in about June, July of that year, of the final results will be put into evidence, so you can see them and so you can compare them, as she is now today. The proof will show that Sandra and her mother and others, by deposition—I might add that the deposition only of Mrs. Briss will be here, taken in North Dakota. Because of the expense [45] involved naturally much of our testimony unfortunately is going to be by deposition because of the distance involved between North Dakota and California—the deposition of Mrs. Briss will be read in evidence to you, the third person

present, actually was in the kitchen at the time that the home permanent was given. Then the proof will show further that starting about week after the application of the cold wave solution after having followed all of the directions meticulously, that Sandra's hair began to come out by the handfuls and the comb-fulls as she combed her hair; that this was a gradual condition, the proof will show you that this wasn't a spotted, down to the skin, like the hand, for instance, condition, but that the hair came out generally all over the head, and broke off all over the head; that she watched this condition and of course expected that it was going to cease and it came out slowly and over a period of weeks until finally—and the testimony will show you—that they became alarmed and on February 28th, some three weeks after the actual application itself and some, something like a little less than two weeks of constant falling out of the hair, they went to their local doctor in Kensal, who is the general practitioner in Kensal, North Dakota, for the surrounding farm area and small towns around there, [46] Dr. Martin, who had been practicing there for some years; that upon becoming alarmed that Sandra was taken to Dr. Martin. The deposition of Dr. Martin, taken also out in North Dakota will be read to you for the same reasons that I have stated before, so that the complete findings and opinion can be brought to you in this case; and on February 28th and after making the examination, he made a prescription, the proof will show, and his testimony will show that upon the finding of certain inflamation and scal-

ing, he made a prescription of a drug known as selsum, for her to use in applying it when she went home. He told her to apply that now for the next two or three weeks and see what the results were. Upon the application of selsum following the doctor's direction, she went on until practically graduation time. By graduation time about half of the remaining hair, the proof will show you, had been gone, to the point that when she graduated from the 8th grade, she had to wear a scarf or something because she was already beginning to become embarrassed because of the condition of her hair, and that by that time of course they were also becoming alarmed. The proof will show you that about three weeks thereafter she, in her Confirmation in Church, her exercises, that by that time which was then in the [47] latter part of June, she had become almost totally bald, and that there was very little hair remaining to the point of where she almost wouldn't appear in public, and on July 6th she went back to Dr. Martin and Dr. Martin immediately, upon seeing her condition at that time, contacted the nearest large clinic, which was in Jamestown, North Dakota, a town of some twelve thousand people, and got hold of a Dr. Sorkness there, the testimony will show you, and requested where in his opinion—Dr. Sorkness' opinion—the best dermatologist in that section of the country could be found. Dr. Sorkness, as the proof will show, referred him to Dr. Melton who is a skin specialist with the Dakota Clinic in Fargo, North Dakota. The little girl was sent in then to Dr. Melton and he examined

her and kept her under his treatment until about the first of October. The testimony will show you that at that time she was practically devoid of hair except for a growth at the nape of the neck and a little hair on the back of the head. The proof will show and the testimony will show that there was and is practically no treatment for it. The proof will further show that by the testimony of Dr. Martin and by the testimony of Dr. Melton that it was the application of [48] the hair wave solution which caused the original loss of hair. Along with that, also, and since having arrived here at Los Angeles for this trial, she has been thoroughly examined by one of your local dermatologists here in this city of Los Angeles. He will testify as to her condition and as to the permanency of this condition, this hair condition, now over three years since having been lost, remaining practically the same as it has. The testimony will be put onto the stand by both doctors and others of the effect that this has had upon the personality of Sandra. The expense that has been incurred and will be yet incurred throughout her life, will be testified to for you. Furthermore, the depositions of two other ladies in the Kensal area who made purchases of the same Rexall Drug Store of the same Cara Nome home wave product, of the fact that they lost their hair at approximately the same time——

Mr. Packard: Just a moment. I object to this argument. It's improper, I don't believe it would be admissible in evidence and that is not the testimony of these witnesses.

Mr. Lanier: If the Court please, I am only summarizing what we are [49] going to prove and the depositions have already been taken.

The Court: I'm rather of the opinion that that will be admissible——

Mr. Packard: May we approach the bench, your Honor?

The Court: Yes, you may.

(Thereupon, counsel for the respective parties and the reporter approached the Bench and the following proceedings were had out of the hearing of the jury:)

Mr. Packard: These depositions were taken and I believe the pretrial order shows, there was objection made on behalf of the defendants, that there is no proper foundation laid for the use of these depositions, and I believe for counsel to refer to it at this time would be improper because I don't believe it's admissible. Secondly, these people did not lose their hair, their hair broke off, there's no evidence that their hair fell out and I think it's improper——

Mr. Lanier: My position, your Honor, is that if I am misquoting any testimony or if I am unable to show what statements I am [50] making in the opening statement, I take my chances.

The Court: The objection is overruled at this time.

(Thereupon, the following proceedings were had in open Court:)

Mr. Lanier (Continuing): By deposition form, the testimony of a Mrs. Don Carlson and a Mrs.

Carl Carlson, who are mother and daughter-in-law, of these purchases, without repeating myself, which I was speaking of at the same Rexall Drug Store, and the same products, but after having been used that their hair also broke off. They will testify for you in the deposition of a brown, strawy hair to the point of where, in order to even it up, they had to go into this nearest larger little town, Jamestown, go to a beauty shop, have it cut off down level with their heads in order to finally get their own head squared away after use of this product. The testimony will also show you that in their cases, it was not permanent; that the hair, as far as they were concerned, after this breaking off, and this burnt condition or whatever it was, that the hair did grow back and did restore itself to normal. The testimony will show you that in Sandra's case she never did recover from it. The testimony will show you further that a doctor— [51] testimony by a local skin specialist here, from out in the Beverly-Hills Hollywood area, will be on the stand for you and will explain exactly why it was that her hair has not come back and why she will have to live with it the rest of life. Secondly, there will be put on the stand for you one of the leading wig and transformation manufacturers in the United States, located also in Hollywood, who will testify to the fact that she has examined Sandra, that she has made measurements for transformations, what those transformations will cost, how long they will last and what the expense will be monthly and yearly for Sandra throughout the rest of her life in order to

maintain a transformation to give her the normal girlish or womanish look later, as she grows older. The testimony also will be submitted to you of a life expectancy of Sandra of some forty-five years, at the age of thirteen, as to how long she is going to have to continue this yearly, constant treatment of hair wigs and transformations. The testimony also was taken by deposition, the proof will show you that, at the request of the defendant some two years ago, Sandra was sent to a Dr. Michelson in the city of Minneapolis, Minnesota, at the request and at the expense of the defendant for the purpose of having her examined for them. The deposition, at the instance of [52] the defendant, of Dr. Michelson, was taken. I presume—I do not know—that Dr. Michelson's testimony will go in on deposition——

The Court: I think you better confine yourself to what you expect to prove.

Mr. Lanier: Your Honor, I will. If not, we will put in the cross examination of Dr. Michelson in the event that they do not, so that you will have at least a portion of Dr. Michelson's testimony, who was examined by them. Now, as a result of this, and as a result of what the testimony will disclose to you, and at your hands we are asking for the sum of $250,000 for the damage that has been done to Sandra and for the expense she is going to incur the rest of her life and with that I feel that I have given you enough of what the case is about, what we intend to prove, so that you can follow our proof as we go along.

Mr. Lanier: At this time, may it please the Court, I would like to call for cross examination under the Federal Rules Mr. Thomas Stark, Assistant Manager of the Rexall Company. [53]

Mr. Packard: I may want to make an opening statement myself, counsel, at this time.

Mr. Lanier: I'm sorry. I didn't know, I'm sorry.

Mr. Packard: May we approach the Bench, your Honor?

The Court: You may.

(Whereupon, counsel for the respective parties and the reporter approached the Bench, and the following proceedings were had out of the hearing of the jury:)

Mr. Packard: At this time, defendant Arnold L. Lewis, doing business as Studio Cosmetics, moves the Court for a dismissal upon the opening statement as to the cause of action based upon negligence, on the ground that counsel has failed to state to the jury in his opening statement that he intends to show any negligence in the compounding and manufacturing of this material whatsoever. True, he stated they relied upon advertising in publications and so forth, and they followed directions and so forth, upon which he can go to the jury on the issue of warranty, but he hasn't stated anything to the jury as to the cause of action based [54] upon negligence, which would properly permit the case to go to the jury. I submit the motion should be granted.

Mr. Bradish: I join in that motion, your Honor.

The Court: Motion is denied.

(Whereupon, the following proceedings were had in open court:)

Mr. Packard: At this time, may it please the Court, counsel and ladies and gentlemen of the jury: As you realize—Mr. Lanier has stated to you what they expect to prove on behalf of the plaintiff in this action—at the outset of the trial, both parties, if they so desire, may state to you what they expect the evidence to indicate to you insofar as their case is concerned. The purpose of the opening statement is so that we, as attorneys, knowing what our proof will be, can outline for you what we expect the proof will be and the evidence will be, as it comes in. We more or less give you an outline setting forth the case and our position. Any statement which I make or any other counsel makes in this action, shall not be considered by you to be evidence. The only evidence will come to you from the witnesses who take the stand. Now, I expect the evidence in this case to indicate—I represent [55] Mr. Lewis, the gentleman seated at the end of the table there, he is one of the defendants and he is doing business as the Studio Cosmetics—that he has been in the beauty supply business since 1929; that in the year of approximately 1936, he went into the cosmetic manufacturing business, and around in 1937, they first manufactured these home permanent kits; I believe at that time, they were a different type of home permanent kits in the cold wave, but in approximately 1941, or about the time of the commencement of the war, the cold wave permanent kit came on the market. At that time, they manu-

factured these cold wave home kits and his kit is known as Cara Nome—that is really a tradename for Rexall—and he manufactured this product which was distributed by Rexall. The evidence in this case will indicate that the formula for the manufacture of these cold wave kits is more or less standard; but the people who supply and furnish the various ingredients to various cosmetic manufacturing houses, supply the proportions and then they are measured by chemists employed by Mr. Lewis at his plant. Then this solution is bottled, put up into certain kits, and then they are distributed by the Rexall Drug Company. I believe the evidence in this case will indicate, ladies and gentlemen, that a particular batch of cold wave solution which will be referred to as Lot No. 181, was manufactured sometime [56] in October of 1954 by Mr. Lewis, doing business as Studio Cosmetics; that that particular lot was distributed over various parts of the country. I believe the evidence will indicate that a certain portion of it went to Chicago, some went to Georgia and, apparently from there, this particular lot 181 found its way to North Dakota; that subsequently the plaintiff in this action—her mother—purchased some of this cold wave solution, Lot No. 181 in a home kit of Cara Nome pin curl permanent. We will offer in evidence, ladies and gentlemen of the jury, the fact that out of these lots certain samples are maintained; we have had an analysis made of lot 181 by a local chemist here; that he has submitted a report and will be here in court to testify to you that the chemical com-

position of the particular batch from which the plaintiff received her home permanent met the standards and was within normal limits of the various cold wave lotions put on the market by producers of such a product in this country. We will show that they used, and you will hear testified, thioglycolate acid as one of the component parts. The evidence in this case will show that various types of cold wave solution vary in their content from three-fourths percent up to 10 percent of thioglycolate acid, depending upon the type [57] of wave; the evidence will show that some of these waves were put out, and the instructions contained —and our client—will show that certain precautions should be taken if a person has a scalp that has sores on it, the hair is broken, and so forth, and some of these solutions, the evidence will indicate, are prepared to be used upon people that have bleached their hair, tinted their hair and their hair will not take quite as strong a solution; others are for normal hair. We believe, and our evidence will show, that the content in this case was 6.94 thioglycolate acid, but the important factor, the evidence will show, is what they call the RH factor, certain ammonium is mixed with the thioglycolate acid and they change it, the evidence will indicate, from an acid to an alkali and, although it's referred to as an acid the solution is an alkali, it is not an acid, but an alkali; that the standard accepted is between 9.0 to 9.5. I believe the evidence in this case will indicate that the RH factor for the particular product in question was 9.05 within normal

limits. I further believe the evidence will indicate that this particular batch had been distributed, and thousands of bottles of it, to various parts of the country. There is no complaint or knowledge or notice that anybody complained to my client about this particular batch other than this one case. [58] I believe the evidence will indicate, by various witnesses, that it is quite frequent that they do have complaints of people having their hair break off at times from certain cold wave solutions. The evidence in this case will show that the doctors that we will call, and the beauty experts, that they have never heard of a case where anybody has permanently lost their hair by reason of the use of a cold wave solution, such as the one in question. We will show that the formula used was a basic formula and that due care was used by the defendant in the compounding, mixing and distributing of this particular product. Further, ladies and gentlemen of the jury, the evidence will indicate that the plaintiff—when I say "the evidence will indicate," you have to accept her statement, so forth, that she did receive a home permanent on February 5, 1955, according to her testimony, in Kensal, North Dakota. I believe the evidence will indicate in this case that there was a mix-up in the time that this wave was placed on her hair. I believe two depositions, of her mother and a Mrs. Jorgenson, state to you by way of depositions, that they started to rinse part of it out and they found out they should have left it on fifteen [59] minutes longer, so they permitted this solution to remain

on her hair a little longer, but I submit to you, ladies and gentlemen, I believe the evidence will clearly indicate that there was an error in the timing factor, in the giving of this wave to this young lady by her mother and this other lady. I believe further, ladies and gentlemen of the jury, that the evidence will indicate that this was given on February 5, 1955; that the plaintiff first saw a local doctor in her home town, who I believe the evidence will indicate was President of the Board of Directors of the School District, and he had examined her shortly prior to that time for a basketball tournament, or something which she was playing in; that he then saw her on February 28, 1955. The evidence will indicate at that time that he diagnosed her case as seborrheic dermatitis; that he found that she was suffering from this condition, which we will have expert witnesses—dermatologists—who will state to you what seborrheic dermatitis is; but I think the evidence will indicate that it is a condition not caused by the application of a cold solution, but from underlying physiological causes, systemic causes. I believe the evidence will indicate that she was prescribed selsum by Dr. Martin, her local physician, on February 28, 1955; [60] that thereafter she did not see any doctor, as far as we know—we have taken her deposition—until sometime in July 1955. She was again seen by Dr. Martin, he referred her to a dermatologist, Dr. Melton, in Fargo, North Dakota; that thereafter she did see a Dr. Michelson, a leading dermatologist, I believe he's located in Minneapolis, I'm not sure ex-

actly—the evidence will show that; that he examined her and his diagnosis was fragilitis crinium and seborrheic dermatitis and he also stated that another condition which must be considered was alopecia areata, which "alopecia" is baldness, "areata" is area, and so forth, but that the cause of it is from an underlying physiological cause or systemic cause; that he had found seborrheic dermatitis, which was a condition found by Dr. Martin on February 28th. Further, ladies and gentlemen of the jury, I believe the evidence will further show that she has been examined by a local doctor on our behalf, a Dr. Harvey Starr, a leading dermatologist in this locality; that he has found, through his examination, that she is suffering from the same condition diagnosed by this leading dermatologist in Minneapolis a couple of years ago, to be fragilitis crinium, and he will explain to you what that condition is. I feel that the evidence will further indicate that Dr. Starr will state that, in his opinion, she has a good [61] head of hair insofar as there is plenty of hair there; that it's a matter of receiving proper treatment and with proper treatment that the plaintiff, this young lady, can eventually have a good thick head of hair if she is properly treated. I believe the evidence will indicate that she now has a seborrheic dermatitis condition; that her scalp is dry; that she has not, as far as we know, and I believe the deposition will indicate, been receiving any proper treatment to restore her hair, but I submit to you that the evidence will clearly show in this case, ladies and gen-

tlemen, that the unfortunate condition from which plaintiff is suffering today was not caused by the cold wave solution which we have mentioned, there was no causal connection at all. I believe the evidence will clearly bear that out. Further, I believe the evidence will clearly bear out there has been no negligence on the part of Mr. Lewis in the compounding, mixing, selling or distributing of this product Cara Nome, or upon the defendant Rexall Drug; there has been no breach of any warranty on the part of the defendant, but the sole, only, proximate cause of the plaintiff's unfortunate condition is due to a systemic condition within her own body and that with the proper medical care and proper [62] treatment, that she can have a good head of hair, and in due time, ladies and gentlemen of the jury, we will ask for your verdict.

Mr. Bradish: I will reserve any statement I have.

The Court: Very well.

Mr. Lanier: May it please the Court, then at this time I would like to call Thomas Stark for cross examination under Federal Rules. [63]

THOMAS H. STARK

called as a witness on behalf of the plaintiff, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Cross Examination

The Clerk: What is your name?

The Witness: Thomas Stark.

(Testimony of Thomas H. Stark.)

The Clerk: (Spelling) S-t-a-r-k?

The Witness: Yes, sir.

The Clerk: Thank you.

Q. (By Mr. Lanier): Would you state your full name please? A. Thomas Henry Stark.

Q. And where do you live, Mr. Stark?

A. Van Nuys, California.

Q. That is near Los Angeles, I presume?

A. It is.

Q. And where do you work?

A. Rexall Drug Company.

Q. That's in their central office here in Los Angeles? [64] A. Yes, sir.

Q. Where is that office located?

A. 8480 Beverly Boulevard.

Q. In what capacity do you work with them?

A. I'm the assistant manager of the insurance and taxation.

Q. And, as such, what are your duties—briefly?

A. Well, every insurance, or claim, against the Rexall Drug Company goes over my desk, and we prepare all the corporate income taxes.

Q. On or about the 26th day of August, of 1957, certain interrogatories were served upon you by the plaintiff in this case, and certain answers were given by your company. Is that correct?

A. To the best of my knowledge.

Q. As a matter of fact, I believe you gave those answers, did you not?

A. No, sir. I don't believe I would have.

Mr. Lanier: Now, your Honor, I don't know

(Testimony of Thomas H. Stark.)

what the rule is here on approaching witnesses from the counsel box. Do I request permission, or do I just do it?

The Court: I suppose you just do it. [65]

Q. (Mr. Lanier, resuming): I show you a copy of those interrogatories sent to me from your company and ask you to look at the particular heading, and then look at any of the questions you want to, and see if it refreshes your memory any?

Mr. Packard: Are you talking about the questions, counsel?

Mr. Lanier: Yes.

The Court: Well that reflects questions and answers, does it not?

Mr. Lanier: It reflects them both, your Honor.

A. Yes, sir, I signed those interrogatories.

Q. All right. Then that does refresh your memory a little, Mr. Stark? A. Yes, sir.

Q. All right. Now, also last Thursday, I believe, I had a subpoena served upon you by the United States marshal to appear, be in Court, and to bring with you the advertising records. Is that correct? A. That's right. Last Friday.

Q. Last Friday. And did you bring them with you? A. Yes, sir.

Q. Would you produce them for me please?

A. They are on counsel's desk there.

Q. Now, all of these records which now are quite voluminous, would you just tell me, briefly, what they consist of. [66] It might save us some time?

(Testimony of Thomas H. Stark.)

A. Well, I briefly looked through them. I have nothing to do with advertising. They consist of the show—radio shows—put on for the years 1953 and '54, the Amos & Andy Radio Shows, and they consist of mats which are used in our nationwide advertising, namely on what we call our "one-cent" sale. We have two of those a year.

Q. Now, in other words, you do have actually with you, certain advertising mats that have been used on a national scale—correct? A. Yes.

Q. That I presume is through national periodicals? A. Yes, sir.

Q. Do you recall, off-hand, which periodicals?

A. From looking at the mats, no; but I know that we advertise nationally through the Farm Journal, Life Magazine and Saturday Evening Post, and one or two others.

Q. Look, I believe, being one of them, is it not?

A. It could be sir; I'm not a reader of Look myself.

Q. And there is also a couple of farm periodicals that you advertise in, are there not?

A. Yes, sir. [67]

Q. Yes. And that advertising has been on a substantial basis ever since 1953, which is all I requested for. Is that correct? A. Yes, sir.

Q. Did you examine the mats yourself?

A. No, sir.

Q. Did you notice whether or not, in your advertising, as to Cara Nome pin curl permanent?

A. No, sir.

(Testimony of Thomas H. Stark.)

Q. You do not know exactly what they say?

A. No, sir.

Q. All right. In that event, would you please produce for me from these particular piles that you have brought here at my request—would you produce the mats of the ads themselves which include Cara Nome pin curl permanent?

Mr. Packard: Just a moment. I object that this is immaterial, irrelevant and incompetent, unless he can show that the plaintiff read, or—this particular—I mean, this is a fishing expedition. If they are claiming that the plaintiff read something, then he could ask this witness as to whether they disseminated this, but it would be immaterial if they spread it all over the country and she used some of it but didn't read it. I mean—— [68]

Mr. Lanier: If the Court please, it's impossible to put two witnesses on the stand at one time. If the testimony doesn't connect up, I am sure of course that the Court will so make a ruling——

The Court: Do you expect to make that proof?

Mr. Lanier: I do, your Honor.

Mr. Bradish: May I be heard? I have no objection to this witness finding the advertising periodicals which are produced here, up to and including the date of the purchase of this product, but did the subpoena call for all of the advertising matter up to the present time, and I submit to the Court that anything subsequent to February 5, 1955, would not be material in connection with this particular case.

(Testimony of Thomas H. Stark.)

Mr. Lanier: It might well be, your Honor.

Mr. Bradish: And much of this information is subsequent to 1955, so if I might suggest that if counsel restricts it to prior to the date of purchase of this product, then I think we can save an awful lot of time. [69]

Mr. Lanier: I will be willing to restrict that to 1953 and 1954, your Honor.

The Court: Very well.

Q. (Mr. Lanier, resuming): Now, could you comply for me please, Mr. Stark?

Mr. Bradish: I attempted to look at these myself, your Honor, and I submit it's going to take a long time.

Mr. Lanier: Well, I have one more suggestion, your Honor, in order not to take the time of the jury, if you just hold one minute. If that is true and if they will submit the particular part which I am talking about to me at a recess, I think probably we can save the time of the jury and the court.

The Court: Are you willing to do that?

Mr. Packard: Anything to save time, I'm willing to do your Honor.

The Court: Do you want to withdraw this witness for a moment?

Mr. Lanier: No, sir, I want some more with him, your Honor; but that part of it can wait if I can have them at the first recess. [70]

The Court: All right.

Q. (Mr. Lanier, resuming): Mr. Stark, are you or not familiar with the Cara Nome natural curl

(Testimony of Thomas H. Stark.)

pincurl permanent box and container in which it comes? A. No, sir.

Q. You are not personally familiar with that?

A. No, sir.

Q. And you are not personally familiar with its contents? A. No, sir.

Q. Since the start of this lawsuit and because you do have jurisdiction within your Company to investigate and put together for preparation when that happened, have you, since the start of this lawsuit, checked this particular package?

Mr. Packard: "This particular package"?

The Witness: You mean check the contents, or——

Q. The package itself, so that you are familiar with your own product and its package, the Cara Nome pincurl permanent? [71]

A. I have familiarized myself with the carton only.

Q. You have not familiarized yourself with the contents? A. In what manner do you mean?

Q. Do you know what the contents are?

Mr. Bradish: May I interrupt just for a moment, your Honor. I don't like to do it, but counsel has directed a question to this witness referring to "this, as your own product," and I might refer counsel to the admitted facts in the pretrial order, and more specifically in paragraph 5 of those admitted facts, in which counsel joined, to the effect that the Rexall Drug Company was the national distributor; that the defendant Rexall did not par-

(Testimony of Thomas H. Stark.)

ticipate in the preparation or the manufacture of the product, but purchased and sold said product in sealed containers as received from defendant Arnold L. Lewis, doing business as Studio Cosmetics Company. So, I believe the question directed to this witness which referred to "this," as "your own product," which infers the product of the Rexall Drug Company, is incorrect, and——

The Court: I think the jury should disregard the reference there to "this product" as Rexall's own product. I assume that counsel means the product was handled by Rexall. [72]

Mr. Lanier: That is correct, your Honor.

Q. (Mr. Lanier, resuming): Mr. Stark, the Cara Nome package which sits here on the counsel table, have you familiarized yourself with that package since the institution of this lawsuit?

A. The carton or the contents?

Q. Both. First of all, take the carton?

A. I know what the product looks like, as far as the carton is concerned, since this incident, and as far as the contents are concerned, I only know from hearsay.

Q. You mean you, yourself, have not looked inside of a like container?

A. Yes, I've looked inside.

Q. And removed the contents? A. Yes.

Q. So that you know what's in it?

Mr. Packard: Now you're talking, after the accident?

Mr. Lanier: After the accident.

(Testimony of Thomas H. Stark.)

A. Well, I know that the carton states that it's a pincurl permanent, but of my own knowledge I wouldn't know. [73]

Q. I'm not going to ask you for any technical knowledge of the contents.

Would you mark this please?

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Thereupon, Plaintiff's Exhibit No. 1 was marked by the Clerk, for identification.)

Q. (Mr. Lanier, resuming): Now, Mr. Stark, I hand you plaintiff's Exhibit 1——

Mr. Packard: Counsel, are you going to show that to us before——

Mr. Lanier: I'm not offering it yet; I'll show it to you before I offer it.

Mr. Packard: Well you're showing the witness, you're referring to it——

Mr. Lanier: This is cross, your Honor, and any time before I offer this I will show it to counsel.

Mr. Packard: I think the——

The Court: I think the normal practice is that you offer it to other counsel, when they suggest a desire to see it. [74]

Mr. Bradish: May I just inquire, is this an exhibit, or is it marked for identification?

Mr. Lanier: It's not marked for identification.

Mr. Bradish: Well you directed your question, you said when you handed it to him, it's plaintiff's Exhibit No. 1. I wonder if——

(Testimony of Thomas H. Stark.)

The Clerk: This is an exhibit marked for identification as No. 1.

(Counsel for Defendants confer.)

Mr. Packard: Okay, you may proceed.

Q. (Mr. Lanier, resuming): I now show you Plaintiff's Exhibit 1, which has been marked for identification and I ask you, Mr. Stark, will you please open up Exhibit 1, examine its contents and tell me whether or not that is the proper content of the Cara Nome permanent wave kit that it purports to be?

Mr. Packard: I object. It calls for a conclusion of this witness—whether that's the proper content. He said that he has not seen it since the incident in question. Therefore, this witness is not properly qualified to testify [75] that this is the content——

The Court: I didn't so understand him to testify. I thought he said he had seen it.

Mr. Packard: No, I believe his testimony was that since this incident——

The Court: Oh, the incident being the use of it by the plaintiff. You've seen it since that time, haven't you. He hasn't seen it before that time, Mr. Packard.

Mr. Packard: That's the point I'm making, he hasn't seen it before that time, so it's immaterial if he is acquainted with the product at this time, because we're only interested in what the content of the box was prior to or before the plaintiff used it.

Mr. Lanier: This is an investigating officer on

(Testimony of Thomas H. Stark.)

claims, your Honor, and certainly can testify himself as to whether or not the simple contents of that bottle are the correct kit or not, and if not he is capable of saying he doesn't know.

Mr. Bradish: Just a minute. Gentlemen, and your Honor, may we have [76] some foundation as to when this bottle was put into this carton and whether or not it is in any way related to the bottle allegedly purchased and used by this plaintiff. This may be a bottle that has just started to be manufactured and put together. I don't have any idea where this particular bottle——

The Court: This man should know what he is being asked. If he doesn't, he can say so.

Mr. Packard: Well I object. There's no proper foundation laid, and it calls for a conclusion of the witness——

Mr. Lanier: It's their product, your Honor. I'm only trying to ascertain if I have the right product and if he can identify it.

The Court: He may answer.

The Witness: Is the question, "Can I identify it"?

Mr. Lanier: As the proper content of the Cara Nome kit?

Mr. Packard: May I ask a couple——

A. No. [77]

Q. (Mr. Lanier, resuming): All right. Will you tell me why not? A. Well——

Mr. Packard: I object to that, that's immaterial, irrelevant and incompetent.

(Testimony of Thomas H. Stark.)

The Court: You may answer.

A. The product is not manufactured by Rexall Drug Company.

Q. Do you distribute that product under your name? A. Under Rexall's name?

Q. Yes? A. Yes.

Q. Then, is that the kit that your company distributes? A. I couldn't answer that.

Mr. Bradish: This has all been taken care of, your Honor, by admissions in admitted facts in the pretrial order.

Mr. Lanier: All right. Do you admit that this is the kit?

Mr. Packard: No. I will not admit that that's the kit and—— [78]

The Court: Let's get along here.

Q. (Mr. Lanier, resuming): Is this bottle a standard part of this kit?

The Court: If you know.

Mr. Packard: I object. It calls for a conclusion of this witness.

The Court: Say if he knows. You object to everything.

Mr. Packard: Your Honor, I take exception to that remark——

The Court: We will never get through with the trial of this case——

Mr. Packard: All right. I would like the record to show——

The Court: Well the record can show what you please.

(Testimony of Thomas H. Stark.)

Mr. Packard: (Continuing) ——I would like to state my objections?

The Court: The Court has said "if you know," and then you jumped up and said it called for a conclusion. [79] If he doesn't know, he can say so.

Mr. Packard: If I may point out, your Honor, to the Court, this witness has testified he has never seen this package until after February 5, 1955, so therefore, it's immaterial, irrelevant and incompetent. Any questions as to what it contained before February 5, 1955, would be a conclusion on the part of this witness.

Mr. Lanier: We could save a lot of time, your Honor, if they would concede that this is the proper package they put out and represented by them——

Mr. Packard: May we approach the bench, your Honor, just one moment and I think we can clear the whole matter up?

The Court: Yes. Anything to clear it up.

(Whereupon, counsel and the reporter approached the Bench and out of the hearing of the jury the following proceedings were had:) [80]

Mr. Packard: The reason that I'm objecting, your Honor, is the fact that counsel has placed before this witness a kit containing a guarantee which my client has advised was never put into the kit. It's a guarantee that if you don't like the product, you get twice your money back, or something like that, but this slip was not in any of them he sent out, and I'll stipulate—I have a kit right on

(Testimony of Thomas H. Stark.)

my desk—I'll stipulate it's a kit that was used, but when we sent them out they did not have this guarantee. Counsel is trying, through this witness, to get this guarantee into evidence. That's the reason I'm objecting so strenuously. He hasn't laid a proper foundation. The guarantee is right there, he can take a look at it.

The Court: The witness has testified he doesn't know.

Mr. Lanier: I think from his last answer. I think that's as far as——

Mr. Packard: I wanted your Honor to know that I wasn't just objecting. That's why I wanted to see the box because he told me during the recess that he had a guarantee. [81] My client advises me he never put the guarantee in; that the distributor would give these out, "that if you don't like this product you get twice your money back" and that was the reason, and I apologize——

Mr. Lanier: They seem to forget there are two defendants, your Honor. I don't care if they put it in.

Mr. Bradish: On behalf of my client, if they are seeking to recover on the guarantee, I'll stipulate it's a guarantee——

Mr. Packard: (Continuing) Anyway, I wanted your Honor to be clear on what my purpose was.

The Court: Very well.

(Whereupon, the following proceedings were had in open court:)

The Court: Proceed Mr. Lanier. The answer

(Testimony of Thomas H. Stark.)

stands so far as I recall. The witness doesn't know the answer to your last question.

Mr. Lanier: Could I have the last question and answer please?

The Court: Are you talking about now or——

Mr. Lanier: I'm talking about all of them generally.

The Court: The objection that counsel makes is that you are trying to get the witness to identify it into evidence here, or lay a foundation for evidence of a kit which was issued some three years later than the time when the kit was used on which this case is based.

Mr. Lanier: That is correct, your Honor.

The Witness: Your Honor, could I answer the question?

The Court: No. You wait. You get a question before you answer.

Mr. Packard: I have a kit here counsel, I'll stipulate you may introduce into evidence——

Mr. Lanier: All right, counsel. Maybe we will shorten this. And also then, will you stipulate at the same time that besides the contents of that kit, that the Rexall Company also put a guarantee with that——

Mr. Packard: Well, now, counsel, I assign that as misconduct. [83] That is the very thing we are objecting to. I have stated that there was no guarantee——

Mr. Lanier: I am asking you when you offer it, can you stipulate it.

(Testimony of Thomas H. Stark.)

Mr. Packard: I submit, your Honor, that——

The Court: Let's start out and do it one thing at a time. Do you wish to stipulate, Mr. Lanier, that this is the type of package that has the contents——

Mr. Packard: This one right here——

The Court (Continuing): ——that was issued to your client at the time or before——

Mr. Lanier: I will so stipulate.

The Court: Then what about the contents? Do you mean to make that include the contents?

Mr. Lanier: I will also stipulate that the contents are correct—let me once check the directions. [84] That the directions are the same——

The Court: The same as what?

Mr. Lanier: As the box sold to us and used by us three years ago, reserving of course any rights that there might be as to different chemical content within this bottle, but that it does represent——

Mr. Packard: That's understood. Mr. Lewis himself purchased it this morning at Rexall.

Mr. Lanier: I so stipulate now with one exception, that is that within the contents of this box there is no guarantee within the contents of this box.

Mr. Packard: I'll stipulate there's no guarantee in there.

Mr. Lanier: All right. Now, will you stipulate further, counsel, that at the time in question, in February 1955, that there was a guarantee within that box?

(Testimony of Thomas H. Stark.)

Mr. Packard: I will not stipulate, because my client tells me he didn't put any guarantee in it, but if Rexall put a [85] guarantee in, maybe Mr. Bradish will stipulate.

Mr. Lanier: Will you so stipulate, Mr. Bradish?

Mr. Bradish: No. I can't stipulate under the admissions in the pretrial order that we bought it in a sealed container and dispensed it in a sealed container.

Mr. Lanier: At this time, then, may it please the Court, I wish to withdraw Exhibit 1, and substitute therefor the bottle which, and the kit, which has been stipulated to between counsel, and have it marked as Exhibit 1, for the plaintiff instead?

The Court: Do you want that marked as an exhibit or merely for identification?

Mr. Lanier: I would now like to have it marked as an exhibit for identification, as Exhibit 1.

Mr. Packard: I'll stipulate that it may go into evidence as an exhibit at this time, if you so wish.

Mr. Lanier: I will so stipulate. [86]

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 1 admitted into evidence.

(Whereupon, the original Plaintiff's Exhibit No. 1, marked for identification, is withdrawn, and in lieu thereof, the bottle and kit stipulated to between counsel, is marked Plaintiff's Exhibit No. 1, received in evidence and made a part of this record.)

Q. (Mr. Lanier, resuming): During the course

(Testimony of Thomas H. Stark.)

of your investigation of this case, Mr. Stark, did you have any occasion to investigate the warranties and the guarantees that when with your merchandise?

Mr. Bradish: Just a moment. I have to object to that question as calling for his conclusion, and a conclusion of law, namely, warranties and guarantees in connection with his merchandise and, again, I must remind the Court of the pretrial admissions that this defendant was a distributor only of the product bought in this little container; they were not manufactured by this defendant. Whether or not it is a warranty is a question for this jury to determine and not a conclusion of this witness. [87]

The Court: Well, do you take the position that even though it might be true that the Rexall Company didn't put the guarantee in that it can't be proved now on account of the pretrial stipulation?

Mr. Bradish: No, if it can be proved that the Rexall Company put a guarantee in there, I'd like to see it. I don't contend——

The Court: Is it your contention that there was no such guarantee put in there—is that your present contention?

Mr. Bradish: Not by the Rexall Company, and, secondly, it's my contention, and my objection is directed to this specific question on the grounds it calls for his conclusion as to what constitute a warranty or a guarantee.

The Court: The question was, did he make an

(Testimony of Thomas H. Stark.)

investigation. He didn't ask for any answer to it.

Mr. Bradish: May I respectfully request a rereading of the question?

The Court: Yes. The reporter may read the question. [88]

(The reporter read the pending question: "During the course of your investigation of this case, Mr. Stark, did you have any occasion to investigate the warranties and the guarantees that went with this merchandise?")

Mr. Lanier: All I have asked, Your Honor, is a yes or no answer.

The Court: Did you investigate that?

The Witness: No, sir.

Mr. Lanier: That does it, Your Honor.

Q. (Mr. Lanier, resuming): Now, Mr. Stark, when was the first time that it came to your attention that a claim was being made against the Rexall Company in the Sandra Nihill case?

A. I couldn't answer that question without my file.

Q. Would you take your file and answer it?

A. My file is in the office.

Q. You did not bring it with you?

A. No, sir, you did not ask for it.

Q. Is it true or not that you received your first notice on [89] July 5, 1955?

A. I believe I answered that question by my last answer, didn't I?

Mr. Lanier: Mark this Plaintiff's Exhibit 2 for identification, please.

(Testimony of Thomas H. Stark.)

The Clerk: Plaintiff's Exhibit No. 2 is marked for identification.

(Whereupon, Plaintiff's Exhibit No. 2, copy of a letter, was marked for identification.)

Q. (Mr. Lanier, resuming): Will you look at Plaintiff's Exhibit 2 and tell me whether or not you have the original of that in your files and whether you personally saw it?

A. I believe we will have a copy of this in our file.

Q. You recall it, do you?

The Court: It would be the original, would it not, Mr. Lanier?

The Witness: Yes, sir.

Q. That's the original of course that you have, is it not? A. I believe so.

Q. And you recall this letter. [90]

A. Yes, sir.

Q. Thank you. Now, then, will you tell me whether or not, shortly after receiving that letter, your company retained the firm of Chase, Fredericks and Fredericks, Attorneys at law at Jamestown, North Dakota, to investigate this claim?

Mr. Packard: You can answer that yes or no.

A. I couldn't answer it either way at this time.

Q. And your records also would disclose of course whether that is true or not?

A. Yes, the records would.

Q. Then, over the evening and after the recess, will you check your records for that and bring your correspondence between you and that law firm of

(Testimony of Thomas H. Stark.)

Chase, Fredericks and Fredericks, of Jamestown, to court with you?

A. When you say "you", are you referring to Rexall or myself?

Q. I'm referring to yourself because the subpoena was served upon you. You answered to interrogatories in the first place and you have testified that you had charge of the investigation of this claim when it came in. I presume that you have the general custody of such records, do you not? [91]

A. I have charge of the records, Mr. Lanier, but I am not in charge of the investigations.

Q. Can you produce those letters that I speak of? A. If they are in our files, yes.

Q. All right. Are you acquainted with Miss A. Roney of your Company? A. Yes, sir.

Mr. Lanier: Mark that exhibit for identification.

The Clerk: Plaintiff's Exhibit No. 3 is marked for identification.

(Whereupon, Plaintiff's Exhibit No. 3, a letter, was marked for identification.)

Q. (Mr. Lanier, resuming): Will you tell me what position with the Rexall Drug Company that Miss A. Roney holds?

A. She is no longer employed by Rexall, but at the time you are referring to she worked as an assistant to a Mr. Bricken.

Q. What is his capacity?

A. He is assistant secretary of Rexall Drugs.

Q. I show you plaintiff's Exhibit No. 3 and ask you, during the course of your investigation,

(Testimony of Thomas H. Stark.)

whether or not you were aware that that letter was written? [92] A. Yes.

Q. All right. You recall that letter, and do you know of your own knowledge that, pursuant to the expression in Exhibit 3, whether or not the Studio Cosmetics Company was so notified?

A. I couldn't answer that without the file Mr. Lanier.

Q. Well, in checking your records, the same as——

Mr. Packard: I'll stipulate maybe counsel, whatever the facts are.

Mr. Lanier: All right. It may be stipulated that on or about August 16, 1955, the Studio Cosmetics Company was advised by the Rexall Company that a claim for damages had been made against them.

Mr. Packard: I also stipulate that Mr. Lewis received a letter under date of August 16, 1955, from Rexall Drug advising him of this claim, on August 16, 1955.

Q. (Mr. Lanier, resuming): You personally, Mr. Stark, are not in the advertising department itself? A. No, sir.

Q. You are not familiar with the advertising program and so forth. A. No, sir. [93]

Mr. Lanier: That's all I have, Your Honor.

Mr. Bradish: Nothing at this time.

Mr. Packard: I haven't any questions at this time.

The Court: You may stand aside.

(Witness is excused.)

Mr. Lanier: May it please the Court, at this time plaintiff would like to call to the stand for cross-examination under Federal Rules, Arnold L. Lewis.

Whereupon,

ARNOLD L. LEWIS

called as a witness on behalf of the plaintiff, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Cross Examination

Q. (By Mr. Lanier): Would you state your full name please? A. Arnold L. Lewis.

Q. And what is your business, Mr. Lewis? [94]

A. Cosmetic manufacturer.

Q. Where do you live?

A. West Los Angeles.

Q. And where is your corporation?

A. This is not a corporation.

Q. Your Company then?

A. The Company is on West Olympic Boulevard.

Q. Here in Los Angeles? A. That's right.

Q. And in what capacity are you with that Company? A. I'm the sole owner.

Q. You are the sole owner. Then, I presume, also the general manager. Is that correct?

A. Correct.

Q. And you have been in that business for how long, Mr. Lewis?

A. Since about 1936.

(Testimony of Arnold L. Lewis.)

Q. And that has been manufacturing cosmetics of various types? A. Yes, sir.

Q. And I presume, as such a cosmetic manufacturer, Mr. Lewis, that you manufacture and then contract with various companies, a distributing agency, to distribute under their brand, or trade name. Is that correct? [95]

A. That is one phase of my business.

Q. And so far as Cara Nome is concerned, you manufacture the product?

A. That particular product.

Q. The name is used by Rexall Company?

A. They own that name.

Q. Yes. And you make it and prepare it for them and so forth? A. Correct.

Q. You also, I presume, had a purchase agreement between you and Rexall Company. Is that correct? A. Yes, in a way.

Q. So that it requires a specific purchase order from Rexall before you make up a batch of cosmetics and deliver on contract for them?

A. Correct.

Q. Do you have with you, by any chance, a sample or an example of that type of purchase order? A. No, sir.

Mr. Lanier: Mark this for identification.

The Clerk: Plaintiff's Exhibit No. 4 marked for identification. [96]

(Whereupon, Plaintiff's Exhibit No. 4, purchase order, was marked for identification.)

(Testimony of Arnold L. Lewis.)

(Counsel for defendants examine said exhibit.)

Mr. Parkard: This is quite long and I would like to read the terms of it, Your Honor.

(Off the record conference between counsel.)

Mr. Packard: May we approach the bench, Your Honor.

The Court: Very well.

(Whereupon, counsel and the reporter approached the Bench, and the following proceedings were had, out of the hearing of the jury:)

Mr. Packard: I have had called to my attention certain contractual provisions in this purchase order and I submit this purchase order is not for the benefit of third parties. That this is an agreement between Mr. Lewis, assuming he entered into this, I don't know, but assuming he did work under this purchase order, certainly we are going to be trying collateral issues as to whether this is for the benefit of any third parties, or the plaintiff. [97]

Mr. Lanier: Counsel, I think you probably have a good point. I will withdraw this.

(Whereupon, the following proceedings were had in open court:)

Mr. Lanier: Mark this please.

The Clerk: Can I give this No. 4?

Mr. Lanier: Well, no, you have a record on the other. I'm perfectly willing to withdraw it, you might as well number it 5, so you don't get confused.

(Testimony of Arnold L. Lewis.)

Mr. Packard: You can leave it in for identification. It's been marked.

The Court: What was it marked—Exhibit 5?

The Clerk: 4. This will be 5. Plaintiff's Exhibit 5 marked for identification.

(Whereupon, Plaintiff's Exhibit No. 5, a Cara Nome Bottle, was marked for identification.) [98]

Q. (Mr. Lanier, resuming): Showing you plaintiff's Exhibit 5, will you tell me whether or not that is a bottle containing the solution—the lotion—within a Cara Nome pincurl permanent box?

A. We use bottles similar to those.

Q. It looks like one of yours, is that correct?

A. Yes.

Q. Will you look at it very carefully and tell me whether or not it does not carry the lot number 181?

A. I'm awfully sorry but if it does, I can't see it.

Q. In other words, you can't read it. All right. But that does look like one of your bottles and is at least certainly one of your labels—correct?

A. Correct, sir.

Q. Now, do you recall, Mr. Lewis, on or about the 26th day of August, 1957, having served upon you certain interrogatories and you giving thereto certain answers?

A. I recall—when was that 1957?

Q. August 27, 1957?

A. Yes, I recall them.

(Testimony of Arnold L. Lewis.)

Q. Do you recall at that time the following question asked you and the following answer given?

"In what proportions are such ingredients"—that's page 3, counsel if you want to follow it—"in what [99] proportions are such ingredients placed in a bottle of the size alleged to have been sold to plaintiff herein?"

And your answer being—

"Ammonium thioglycolate—5%; aqua ammonia C.P.—.75%; distilled water 94.25%."

A. Could I see the——

Q. You may. (Counsel handed the document from which he was reading to the witness.)

A. Well, this is correct in part. I can——

Q. One moment—first of all, I want to know if you answered that interrogatory?

A. I did answer it.

Q. And is that the answer that you gave me?

Mr. Packard: I'll stipulate, counsel, that those are the answers——

Mr. Lanier: Well I prefer to go——

Mr. Packard: I'll stipulate that all the answers contained in there are the answers that he has set forth at that time.

Mr. Lanier: And you agree then, Mr. Witness——

The Witness: That's correct.

Mr. Lanier: All right. And at that time you answered and said that the content was 5% ammonium thioglycolate? A. Yes, sir.

Q. Now, also, did you or not tell me that it was made under the supervision of a chemist?

(Testimony of Arnold L. Lewis.)

A. Correct.

Q. And what is the name of that chemist?

A. That chemist is no longer employed by us. When are you referring to, what period, 1957?

Q. Batch 181.

A. Oh, Batch 181. That was in 1955. The chemist's name was Louis Monteau. (?)

Q. And where is he now?

A. I don't know.

Q. Why did he leave your company?

Mr. Packard: That's immaterial.

Mr. Lanier: It becomes material under your negligence allegations, Your Honor.

Mr. Packard: There's no materiality—— [101]

The Court: Sustained.

Q. (Mr. Lanier, resuming): Were the services of the chemist who had charge of preparing batch 181 satisfactory? A. Yes, sir.

Q. Was he discharged for any misconduct on duty? A. No, sir.

Mr. Bradish: Just a moment. I object to that. It's assuming facts not in evidence. If he was discharged——

The Court: The whole question is, was he discharged, and if he was, was it for misconduct.

A. I could say that he was not discharged.

Q. Was he a competent chemist?

A. Yes, he was.

Q. You have no idea who he is working for now?

A. Well, I haven't any idea; I think I can find out.

(Testimony of Arnold L. Lewis.)

Q. Well, in the interrogatories of last August 27th, you were asked to find out, were you not? Were you asked where he was?

A. I don't remember. [102]

Q. Your answer was "no", that you didn't know.

A. Perhaps I didn't know at the time.

Q. If you can find out, will you get me his address and have it in court tomorrow morning?

A. I can't guarantee that.

Q. If you can.

Mr. Packard: We don't have to, at this time, investigate the case for him.

The Court: Well, if he can get the information and give it to counsel, counsel will get him into court I expect.

Mr. Lanier: In spite of counsel, if you can find it, will you bring it back tomorrow morning?

A. You mean the——

Q. Mr. Monteau. A. Bring him back?

Q. No, his address.

A. Oh, I beg your pardon. I certainly shall do so.

Q. Now, then, we are agreed that the solution used was from batch 181, are we not?

A. Well, I don't know who agreed to that, but assuming that that is the number that appears on that bottle [103] and if that's the bottle that's used, then that is from that batch.

Q. All right. And you have had checked what samples you could from wherever they could be found, of 181, is that correct?

(Testimony of Arnold L. Lewis.)

A. Yes, sir, I think that's correct.

Q. And will you tell me what the actual ammonium thioglycolate content was in the check that you made?

Mr. Packard: Well I object, it's incompetent, irrelevant and immaterial, and it's privileged.

Mr. Lanier: He has made a check of his own product, there is a lawsuit now being tried, counsel has made a statement to the jury of what the content of ammonium thioglycolate is, and now it's privileged.

The Court: I think he should be permitted to answer, Mr. Packard.

Mr. Packard: I have a report—this witness I think he said it had been made—I had it made——

The Witness: I was just going to——

Mr. Packard: I mean the witness has never——

Q. (By Mr. Lanier): Do you know what the percentage of thioglycolate was in that particular report?

Mr. Packard: I object. The best evidence is the report itself.

Mr. Lanier: This is cross-examination, Your Honor.

The Court: If he knows, he may tell him.

The Witness: I know it because I saw the report.

Q. All right, will you tell me what the percentage was?

A. I can't tell you exactly. I think it was six-nine-four, or seven——

(Testimony of Arnold L. Lewis.)

Q. It was approximately seven percent, was it not? A. Approximately.

Q. All right. Seven percent being about forty percent higher than the five percent which you instructed your chemist to put in?

Mr. Packard: Just a moment, I object to the form of the question. It's assuming facts not in evidence, "that he instructed the chemist to put in".

The Court: Well, I suppose the witness has no business of calculating [105] for you, Mr. Lanier.

Mr. Packard: Assuming facts not in evidence, that he instructed his chemist to put any particular percent in.

The Court: Yes, that was in the statement. Of course, the jury will disregard it.

Mr. Lanier: Will you mark this for identification please.

Mr. Packard: What's this?

Mr. Lanier: Counsel, in due time you will see what it is.

The Clerk: Plaintiff's Exhibit No. 6 is marked for identification.

(Whereupon, Plaintiff's Exhibit No. 6 was marked for identification.)

Mr. Lanier: Now, counsel, I show you plaintiff's Exhibit 6, which are the interrogatories previously asked of this witness, and answered. At this time, may it please the Court, I offer in evidence Plaintiff's Exhibit 6, Interrogatories asked and answers given by this witness. [106]

Mr. Bradish: If the Court please, on behalf of

(Testimony of Arnold L. Lewis.)

the Owl Drug Company and Rexall, I would like to object to these as not being binding on that defendant, they being the interrogatories of another defendant—co-defendant in the case, and for which there has been no——

The Court: That would be true as to this exhibit, wouldn't it?

Mr. Lanier: It would not, Your Honor. Now because of that, in order to answer some more of this again, would you please mark this exhibit taken by this particular defendant——

Mr. Bradish: May we have first the Court's ruling on my objection?

The Court: Objection sustained at the moment as to the Rexall people.

Mr. Packard: And I would like to object, Your Honor, upon the basis, I have no objection to the particular question that's been asked the witness, but there's six pages and a lot are objectionable. We go ahead and answer these interrogatories, but I feel we are not [107] bound, there's a lot of information in there that isn't admissible. It's my understanding, they are to give him information, he may confront the witness, and we have a right to object on each and every one of the questions that are asked, if there's any proper objection to them, but to just throw all the interrogatories into evidence——

The Court: Well, perhaps you better confine it to the one that you think is——

Mr. Lanier: If the Court prefers that I pursue

(Testimony of Arnold L. Lewis.)

the question and answer, I will Your Honor.

The Witness: Could I confer with my attorney to clear up a point?

The Court: Mr. Lanier, the witness would like to speak to his attorney for just a moment.

Mr. Lanier: Well I guess I can understand that, Your Honor. I have no objection.

The Court: You may step over and speak to him. He has a matter he wants to clear up in his mind, he has a right to do that. [108]

Mr. Packard: Come over here.

(The witness confers with counsel and returns to the witness chair.)

Q. (Mr. Lanier, resuming): Mr. Lewis, in the interrogatories asked you, at the bottom of page 2, counsel, on August 27th, to which you answered, were or not the following questions asked and the following answers given?:

Question—"What are the ingredients, chemical or otherwise, in Cara Nome?"

And did you not give the following answer:

Answer—"The ingredients used in the Cara Nome permanent wave are common chemicals used in virtually all permanent wave preparations on the market, namely, ammonium thioglycolate, distilled water and aqua ammonia C.P."

Did you or not give that answer?

A. Yes, sir.

Q. Did you not give the following answer and question:

"In what proportions are such ingredients placed

(Testimony of Arnold L. Lewis.)

in a bottle of the size alleged to have been sold to plaintiff herein?"

And for answer, did you not state: [109]

"Ammonium thioglycolate—5%;"

A. I said that because at that time——

Q. Now, just answer yes or no.

Mr. Packard: We stipulate——

The Court: Let him answer the question.

A. I said that at that time because I was under the impression——

Q. Yes or no, Mr. Witness?

A. I'm sorry, I'd like to qualify that yes or no.

The Court: You can qualify it later, but at this time you've no question like that before you.

A. Yes, I said that.

Q. Now your tests that you made of batch 181, will you tell me, first of all, where the bottles came from that you secured to make the tests?

A. From our laboratory.

Q. In other words, bottles still there which had not been shipped out?

A. These particular bottles were from samples which were retained from each batch.

Q. Samples? [110] A. Correct.

Q. Will you tell me and the jury how you go about sampling?

A. When a batch is completed, the first few bottles are taken off the line and set aside with a mark on them as to that particular batch—the code number is on there, so there's no need to mark it other than to set it aside.

(Testimony of Arnold L. Lewis.)

Q. And that is the way that you get your samples? A. Correct, sir.

Q. And the rest of them are sold or put out under contract? A. Yes.

Q. And those samples, and those samples only, are the ones that you keep for your samples?

A. Correct.

Q. So they come out of the batch first?

A. Well, not necessarily. Sometimes we take them out of the middle of the run; there's no set procedure on that.

Q. Ever take them off the bottom?

A. Occasionally.

Q. Primarily you are interested in sampling it first, are you not? [111]

A. Only for the purpose of keeping a bottle or two on hand for subsequent checks.

Q. Then, your first statement to me that the first thing you do is to take off two or three bottles of sample is incorrect?

A. I said occasionally we do that.

Q. Occasionally?

A. I'm not there——

Mr. Packard: I object. This is argumentative, Your Honor.

Mr. Lanier: It's very material, Your Honor.

The Court: I think he is trying to get at what the real procedure is.

A. There's no set procedure on that.

Q. You're apt to take that sample bottle anywhere then—— A. That's correct.

(Testimony of Arnold L. Lewis.)

Q. All right. Any particular reason in taking it from the bottom of the batch? The last of the batch?

A. It wouldn't make any difference; there's no special reason.

Q. Then there isn't any reason for doing it that way? A. No, sir. [112]

Q. All right. When you call a batch, like 181, how is that batch made up, what is it contained in, what is it mixed in?

A. It's mixed in a vat, capacity of three hundred gallons.

Q. That's one vat, three hundred gallon capacity? A. Correct.

Q. And that constitutes one batch?

A. Yes.

Q. Even if your order was large enough to require two or three of them, that would be another batch number? A. Correct.

Q. Whatever is in that one vat constitutes a batch number? A. (None).

Q. You seal all of your bottles before being delivered? A. Seal them?

Q. Yes?

A. They are sealed with a film-o-seal cap or were about that time. I don't recall when we changed our capping procedure, but we did use a film-o-seal cap, which is a piece of paper that is inserted inside the cap. The cap comes to us in that way, and we apply a mucilage to the top of the bottle and when the cap is put on the bottle it forms a seal. [113]

(Testimony of Arnold L. Lewis.)

Q. Theoretically then, they are sealed air-tight?

A. Correct.

Q. Why did you change?

Mr. Packard: I object. That's immaterial, irrelevant and incompetent.

A. We found it wasn't necessary——

The Court: Overruled. I think he—are you answering that?

Q. It wasn't necessary what?

A. It wasn't essential, I don't mean necessary. It wasn't essential.

Q. What is the difference, what do you do now?

A. We use a newer method which we believe gives a better seal, and is a polyethylene liner, called a poly-seal liner.

Q. And you feel it gives a better, more airtight seal than the one you were using at this time?

A. Yes, sir.

Q. So I take it you had some difficulty with the seal at the time—— A. No, sir.

Q. ——of this one? [114]

Mr. Packard: I object——

The Court: He said he did not have, so——

Q. But this definitely is a better seal?

A. It's a better manufacturing procedure.

Q. And making it more ascertained of being airtight?

A. I can't answer that other than it is a better manufacturing procedure in keeping with modernizing our operation.

(Testimony of Arnold L. Lewis.)

Q. Now, so far as you are concerned, Mr. Lewis, do you package the entire kit?

A. Yes, our Company packages the entire kit.

Q. And that, of course, is done under contract?

A. Yes.

Q. Do you personally, yourself, as Studio Cosmetics, do you put any guarantees, written, within the package? A. No, sir.

Q. You have nothing to do with that?

A. No, sir.

Q. Anything that Rexall may do with that package, you don't know anything about?

A. I know nothing about what they do with it after it's [115] shipped out of our place.

Q. Well now suppose that Rexall comes back and tells you they have had two or three bottles returned. Do you make that good to them or not?

A. Never have.

Q. Then you know nothing about any guarantee that they might have with a jobber or a retailer?

A. Nothing other than just what I've just stated.

Mr. Lanier: Mark this for identification.

The Clerk: Plaintiff's Exhibit No. 7 marked for identification.

(Whereupon, Plaintiff's Exhibit No. 7 was marked for identification.)

The Court: How much longer will this witness take, Mr. Lanier?

Mr. Lanier: I'm just about through, Your Honor.

Q. (Mr. Lanier, resuming): Mr. Lewis, I show you plaintiff's Exhibit No. 7 and ask you whether

(Testimony of Arnold L. Lewis.)

or not you are familiar with that document at all, or its type?

A. I am not familiar with it excepting that I think I saw this at the Rexall Drug Company at one time. [116]

Q. In other words, when you had been over at the Rexall Company you have seen those there?

A. I may have, I don't know. If I go to their drugstore I might see that.

Q. You have nothing to do with its preparation?

A. No, sir.

Q. And you have nothing to do with inserting that with your Cara Nome products?

A. No, sir.

Q. During the course of this testing, on this batch 181, do you know how many bottles were tested—was it from one or more?

A. Which testing are you referring to?

Q. The testing of the breakdown for the percentage of the ammonium thioglycolate?

A. There's no testing that does on. We don't start to bottle it until we know what the percentage is.

Q. Excuse me, Mr. Lewis, maybe I haven't made myself clear. Since the institution of this lawsuit, you have had certain samples of batch 181 broken down chemically for content?

A. I haven't had that done.

Q. Are you aware though of how it was done?

A. I have an idea how it was done. [117]

(Testimony of Arnold L. Lewis.)

Q. Do you know how many samples were made, from how many bottles?

A. I think only one.

Q. Only one. All right. That's all, Your Honor.

Mr. Packard: I don't have any questions at this time.

The Court: You may stand aside.

Members of the Jury, you will be permitted to separate for the evening and night and be back at ten o'clock in the morning in the jury room and you will be re-called as soon as the court is ready for you. I hope we get started very promptly in the morning. We've been delayed so much today, but don't talk to anybody about the case or permit anybody to talk to you about the case or permit anything to happen that might influence your thinking about the case. Keep your minds open and free and clear of all influences and suggestions except as you receive them here in this court-room from the witness-stand and from counsel and the court. You may go and be back at ten o'clock in the morning.

(Whereupon, at 4:35 o'clock p.m., April 8, 1958, the hearing was adjourned until ten o'clock a.m., April 9, 1958.) [118]

Be It Remembered, that a further hearing was had in the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge Presiding, and a Jury, in the Federal Court Room, Federal Building in the City of Los Angeles, State

of California, on April 9, 1958, beginning at the hour of 10:10 a.m.

There were present, at said time and place, the appearances as heretofore noted.

Thereupon, the following proceedings were had in open Court:

The Court: All right, gentlemen?

Mr. Packard: Let me state, Your Honor, before we proceed, yesterday [119] Mr. Lanier offered these interrogatories, and I have read them and I have no objection to the interrogatories being offered in evidence, which he offered yesterday.

Mr. Lanier: No, I am satisfied now, Your Honor, the way we have proceeded.

The Court: Well, if you change your mind then you know what the position of the defendant is.

Mr. Packard: Yes, at any time you wish to offer them, I have no objection.

The Court: You may call your next witness if you are ready.

Mr. Lanier: May it please the Court, at this time I would like to call Mr. Stark back to the stand.

Thereupon,

THOMAS H. STARK

recalled on behalf of the plaintiff for further cross examination by Mr. Lanier, having been previously sworn, testified as follow, to-wit: [120]

Cross Examination

Q. (By Mr. Lanier): Yesterday, Mr. Stark, I requested that you take your advertising material which you had brought under subpoena and find me

(Testimony of Thomas H. Stark.)

those ads and maps for the years 1953 and 1954. Were you able to do that? A. Yes, sir.

Q. Do you have them with you?

A. Yes, sir.

Q. May I see them, please?

Mr. Bradish: Are these the ones?

The Witness: Yes.

(Witness hands documents to counsel.)

Mr. Lanier: Could I have a moment, Your Honor, to look at these?

The Court: All right.

Mr. Lanier: Will you mark each one of these please, for identification, plaintiff's Exhibits.

Mr. Packard: Are they being marked as one?

Mr. Lanier: They will probably have to be marked individually——

The Clerk: That would probably be better.

Mr. Lanier: ——there are so many different sizes and what-not. It would be pretty hard to put them together.

(Thereupon, Plaintiff's Exhibits Nos. 8 through 25, were marked for identification by the Clerk.)

The Clerk: Plaintiff's Exhibit 8 through 25 marked for identification.

Q. (Mr. Lanier, resuming): Now, Mr. Stark, to save time, in going through these, you are just vaguely familiar with them, are you not, and their contents? A. Yes.

Q. These Exhibits 8 through 25 inclusive are ad proofs, are they not, of ads which were run in

(Testimony of Thomas H. Stark.)

the years 1953, 1954, in various National periodicals?

A. To the best of my knowledge, yes.

Q. As you testified to yesterday? Now in addition thereto, Mr. Stark, Rexall also advertises Cara Nome products over t.v. and radio, do they not?

Mr. Packard: I think it should be limited to before or prior to February 5, 1955. We are not concerned with what they are doing today. I think the only relevant thing is what they were doing back in February 5, 1955.

The Court: I think that would be true, Mr. Lanier.

Q. (Mr. Lanier, resuming): All right. In 1953 and '54 Rexall also advertised Cara Nome Products via the medium of tv and radio?

A. It's very possible, but not to my own knowledge Mr. Lanier.

Q. All right. Now I also requested of you, Mr. Stark, that you bring with you the original of the letter of July 5, 1955, written to you. Did you bring that with you?

A. I don't have the original, Mr. Lanier; I have a photostat of the original.

Q. Do you have that with you?

A. Yes.

Q. May I have that, please?

A. It would be right on the bottom, Mr. Lanier.

(Counsel is making search through papers for document in question.) [123]

Mr. Lanier: Now, may I have this marked for identification.

(Testimony of Thomas H. Stark.)

(Thereupon, Plaintiff's Exhibit No. 26 was marked for identification, by the Clerk.)

The Clerk: Plaintiff's Exhibit No. 26 marked for identification.

Q. (Mr. Lanier, resuming): Now once more, Mr. Stark, I show you Plaintiff's Exhibit 2, which was shown to you yesterday and which you recognized. Now the photostat which I have is dated August 8th, from Mr. Roney; that letter is dated July 5, from Mr. Roney. Do you have the original of Exhibit 2?

A. Could you bring me my file?

Q. Sure. (Counsel hands file to witness.)

The Court: Do I understand that the exhibit you presented to the witness is Exhibit 2?

Mr. Lanier: Exhibit 2, yes, sir.

A. I have the copy of the letter, Mr. Lanier, not the original. This is a complaint which was written up and it quotes this letter exactly.

Q. Now, the exhibit that you are holding in your hand is not dated, is that correct or not?

A. The Exhibit I am holding in my hand is dated August [124] 22, 1955.

Q. May I see that a moment please? I want to have this marked for identification please.

(Thereupon, a document entitled "Complaint No. A-3584" was marked by the Clerk, Plaintiff's Exhibit No. 27, for identification.)

The Clerk: Plaintiff's Exhibit No. 27 marked for identification.

Mr. Packard: 26 is a letter under date of what?

(Testimony of Thomas H. Stark.)

The Court: What is the exhibit number?

Mr. Lanier: 27, Your Honor.

Q. (Mr. Lanier, resuming): Now, Mr. Stark, handing you back Exhibit 27, that refers to Plaintiff's Exhibit 2, does it not?

Mr. Bradish: Wait a minute, wait, wait——

Mr. Packard: I haven't seen that letter, the first letter——

Mr. Lanier: I am not talking about the contents of this, counsel.

Mr. Bradish: Well, if you say that refers to one exhibit and you are not talking about the contents, may I have some [125] expression from counsel as to what he is talking about? I think that if he is referring to the contents, I'll have to object. He is asking this witness to interpret demonstrative evidence, which——

Mr. Lanier: I am not referring to the contents, Your Honor. I am only laying a foundation to introduce a copy, Exhibit 2, into evidence, which is dated.

The Court: Apparently there is no question pending about the contents.

(Counsel confer.)

Q. (Mr. Lanier, resuming): In looking at Exhibit 27 again, Mr. Stark, and in looking at Exhibit 2, without discussing its contents at all, are they identical? A. No.

Q. Is the letter set forth in Exhibit 2, set forth in its entirety in Exhibit 27? A. Yes.

Q. Now, do you have the original Exhibit 2?

A. No.

(Testimony of Thomas H. Stark.)

Q. All right. At this time, may it please the Court, I offer into evidence Plaintiff's Exhibit 2——

Mr. Bradish: Just a minute. To this I am objecting, because the [126-127] letter that's set forth in Exhibit No. 27, is not dated, Your Honor. It's a part of a report which bears the date of August, I believe it's the 22nd, and it refers to the contents of a letter which was received but the date is not shown. Now the photostatic copy of the letter which counsel asked Mr. Stark to bring bears date of August 8th, and if counsel will check with that letter he will find that the contents of the letter bearing date of August 8th is identical to the contents contained in part in the report, Exhibit 27. I object to the introduction of this document on the ground that it is a copy, not the original, and that no foundation has been offered for the admission of secondary evidence.

Mr. Lanier: May it please the Court, I am sure I don't know exactly what this bickering is about. This witness has testified that he is aware of the contents of that letter. He has testified that he has received that letter. He has testified that he does not have the original in his files. Therefore, the secondary copy becomes admissible.

Mr. Bradish: If the Court please, he has testified [128] that he received a letter of the contents which is contained in Exhibit 27, and he has a photostatic copy of that letter in his files which counsel requested yesterday, and which bears the date of August 8, 1955, and I'll ask the Court to

(Testimony of Thomas H. Stark.)

please compare the contents of the letter of August 8, 1955, which was introduced as an exhibit here, with the wording which is contained in this letter, and this copy purports to be dated July 5th. The dates here, of course, Your Honor, are exceedingly important and that's the reason for the objection.

Mr. Lanier: May it please the Court, the letter of August 8th, we also have, and we will eventually get to it after we dispose of the letter of July 5th. The letter of August 8th is an entirely separate letter. We have a copy of the letter of August 8th also.

The Court: Well perhaps you better—I'll withhold ruling here until you get around to the 8th, so I can straighten the whole matter out in my mind.

Q. (Mr. Lanier, resuming): Now, Mr. Stark, referring you to Plaintiff's Exhibit 26. Is that a photostatic copy of a letter received by you in re Sandra [129] Nihill, from Mr. T. A. Roney, of Carrington, North Dakota? A. Yes, sir.

Q. And this was a photostat from your files—correct? A. Yes.

Mr. Lanier: At this time, may it please the Court, I offer into evidence Plaintiff's Exhibit 26.

Mr. Bradish: Just one moment. I have no objection to its coming in, but I would like counsel to show me what he has heretofore alleged that he has. His office copy of the letter which is photostated——

Mr. Lanier: Counsel, at the present time, I have been looking for that and I do not find it.

Mr. Bradish: That's what I suspected.

(Testimony of Thomas H. Stark.)

Mr. Packard: There is one thing further. I object on behalf of Lewis, that it isn't notice to my defendant. In other words I have that objection, Your Honor, and I believe the Court understands my position in that matter. It's hearsay insofar as—— [130]

The Court: This exhibit 26 will be admitted——

Mr. Packard: As against the defendant, Rexall——

The Court: I'll admit it generally at this time. We will set it aside later if I find it is not properly——

The Clerk: Plaintiff's Exhibit 26 is received in evidence.

(Thereupon, Plaintiff's Exhibit 26, heretofore marked for identification, is received in evidence and made a part of this record.)

Mr. Lanier: Counsel has already stipulated yesterday that they received notice from Rexall, your Honor. Now I again re-offer Plaintiff's Exhibit 2.

Mr. Bradish: Well, again I have to object to the offer of Plaintiff's Exhibit 2, and ask your Honor to again inspect the contents of what purports to be a copy of a letter dated July 5th, with Plaintiff's Exhibit No. 26, and I think your Honor will determine that they are identical except for the dates, one bearing August 8th, and the other bearing date of July 5th. This document, Plaintiff's 2 for [131] identification, is a copy, and there has been no foundation laid for the admission of secondary evidence.

(Testimony of Thomas H. Stark.)

Mr. Lanier: I repeat, your Honor, this witness has testified he received that letter, he testified he does not have the original in the file, a copy now becomes admissible.

Mr. Bradish: Your Honor, I must remind the Court this witness did not say that he received a copy of the letter dated July 5th. He said he received a copy of the letter, the contents of which is contained in Plaintiff's Exhibit No. 26. He didn't say he received a letter on July 5th.

Mr. Lanier: We could read his testimony back of yesterday, your Honor.

The Court: The Exhibit will be admitted.

The Clerk: Plaintiff's Exhibit 2 admitted in evidence.

(Thereupon, Plaintiff's Exhibit 2, heretofore marked for identification, is received in evidence and made a part of this record.) [132]

Mr. Packard: I would like the record to show I object on the same grounds heretofore stated.

The Court: It will so show.

Mr. Lanier: That's all Mr. Stark.

(Witness is excused.)

Mr. Bradish: Your Honor, I hate to press this matter, but a moment ago when you deferred ruling on the admission of Exhibit No. 2, you said you would defer it until such time as counsel could produce what he told us he could produce here, namely, an office copy of the letter bearing date of August 8th, and I wonder if your Honor will require counsel to do that at this time?

The Court: Do you have such copy?

Mr. Lanier: I have already stated, your Honor, that I can not locate the copy of the letter of August 8th. If I do so in my files later, I will certainly produce it.

The Court: All right. I'll let the ruling stand.

Mr. Lanier: At this time, may it please the Court, I would like to call the plaintiff, Sandra Mae Nihill.

Thereupon,

SANDRA MAE NIHILL

called as a witness in her own behalf, after being first duly sworn by the clerk, in answer to questions propounded, testified as follows, to-wit:

Direct Examination

By Mr. Lanier:

Now, Sandra, I want you to speak up clearly and loudly enough so that all the members of the jury and the reporter, can hear you.

Q. Would you state your full name please?

A. Sandra Mae Nihill.

Q. And where do you live, Sandra?

A. Kensal, North Dakota.

Q. How old are you now? A. Sixteen.

Q. At the time of the use of the Cara Nome home permanent, how old were you then?

A. Thirteen.

The Court: Now, listen, see that young man away over there on that far end—far corner—you're talking to him you know, because if he doesn't hear you, you won't get anything out of your evidence, and

(Testimony of Sandra Mae Nihill.)

this is your [134] case, and you talk up so he can hear you.

Q. (Mr. Lanier, resuming): What was your answer to your age at that time, Sandra?

A. Thirteen.

Q. Prior to that time, Sandra, had you ever had a home permanent wave? A. Yes.

Q. Was it or not successful? A. It was.

Q. How often had you had a wave?

A. I couldn't answer that.

Q. You do recall other instances prior to that of February 5, 1955? A. Yes.

Q. And any and all that you had, have been successful? A. Yes.

Q. Now, Sandra, also prior to February 5, 1955, what had been the general condition of your health?

A. Perfect health.

Q. You were not sick? A. No sir.

Q. Nor sickly? A. No sir.

Q. Requiring medical care? A. No sir.

Q. Had you ever had any diseases of the skin?

A. No, sir. [135]

Q. Have you ever been treated for any skin irritations or disturbances prior to February 5, 1955?

A. No.

Q. In what grade were you in February 5, 1955?

A. Eighth grade.

The Court: I couldn't hear you, even sitting this close.

The Witness: Eighth grade.

The Court: Keep your voice up as if you were

(Testimony of Sandra Mae Nihill.)

talking back there to your father, if that is your father sitting back there—that is, isn't it?

The Witness: My uncle.

The Court: Suppose you talk to your uncle back there and make him hear you, what you say.

Q. (Mr. Lanier, resuming): Now, Sandra, calling your attention to February 5, 1955, did you have occasion to go with your mother in to the town of Kensal? A. Yes.

Q. Where do you live from Kensal?

A. We live north about four and a half miles.

Q. On a farm? [136] A. Yes.

Q. And did you drive into Kensal with your mother? A. Yes.

Q. Did anyone else go with you?

A. No, sir.

Q. Where did you go in Kensal?

A. You mean the day we got——

Q. February 5, when you bought the permanent?

A. We went to the drug store.

Q. And what kind of a drug store is that?

A. Just a drug store I guess, it's got a little bit of everything.

Q. Is it or not a Rexall Drug Store?

A. Yes, sir.

Q. Is it the only drug store in Kensal?

A. Yes.

Q. And did you go there and make a purchase?

A. Yes, sir.

Q. And what did you buy?

A. Well we went in and bought the permanent.

(Testimony of Sandra Mae Nihill.)

Q. And what kind of permanent was it?

A. Pin curl Cara Nome.

Q. Did all of you hear that? Sandra they are not hearing. What kind of pin curl did you buy?

A. Cara Nome pin curl. [137]

Q. Fine. And was there, or not, a display in the store of this Cara Nome pin curl?

A. Yes, there was.

Q. Now, Sandra, I show you Plaintiff's Exhibit 7. Will you tell me, have you seen this exhibit before?

A. (Examining Exhibit 7) Yes, sir.

Q. And was that exhibit on the shelf in special display in the Rexall Drug Store in Kensal at the time you made your purchase?

Mr. Bradish: Just a minute. Your Honor, I have to object to that as being a little bit leading and suggesting.

The Court: Yes. Let the witness testify. Objection sustained, question stricken.

Q. (Mr. Lanier, resuming): Where did you first see Exhibit 7?

A. It was with the boxes of pin curls, it was located right there.

Q. In the Rexall Drug Store at Kensal——

A. Yes, sir.

Q. At the time you purchased it?

A. Yes, sir.

Q. And who gave you this Exhibit 7?

A. The druggist there.

Q. At the drug store? [138] A. Yes.

(Testimony of Sandra Mae Nihill.)

Q. At the Rexall Drug?

Mr. Bradish: Just a minute. Again, I have got to object to counsel saying "at the Rexall Drug," insofar as he is calling for a conclusion of this witness as to the fact, or not the fact, that Rexall is the owner of the drug store. I think the evidence——

The Court: Well if it's known as the Rexall Drug Store, I'll deny the objection.

Mr. Bradish: We have no evidence to whether it's known as the Rexall Drug Store.

The Court: Well develop that fact, if you will.

Mr. Lanier: She already testified to that, your Honor.

Q. (Mr. Lanier, resuming): What is the name of this drug store in Kensal?

A. I believe it's——

The Court: Keep your voice up. You're just talking to your attorney there now. The jury must hear you.

Q. (Mr. Lanier, resuming): It's what, Sandra?

A. The only name I know is by the Rexall Drug.

Q. That's the only name you've ever known it by? All right. Now, did you take this Exhibit 7 home with you at the time of your purchase?

A. I believe so.

Mr. Lanier: At this time, may it please the Court, I offer this in evidence as Plaintiff's Exhibit 7.

Mr. Packard: What was the answer to that last question?

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: "I believe so."

Mr. Packard: I object, your Honor, if she believes so, there's not a proper foundation established.

Q. All right, Sandra, did you, or not, take Exhibit 7 home with you? A. Yes.

The Court: I didn't understand—her voice was so low. Before I rule on that—I didn't understand where she found it, it was somewhere about the store, but I didn't understand——

Mr. Lanier: She testified it was on display in the Rexall Store and was given to her by the druggist at the time of her purchase. [140]

The Court: Any objection to that statement into evidence?

Mr. Packard: Well, I'm objecting that it's hearsay insofar as Defendant Lewis is concerned.

The Court: You're offering it in evidence——

Mr. Lanier: I'm offering it, your Honor.

Mr. Bradish: I have no objection.

The Court: Admitted.

(Thereupon, Exhibit No. 7, previously marked for identification Plaintiff's Exhibit No. 7, was received in evidence and made a part of this record.)

The Clerk: Exhibit No. 7 admitted in evidence.

Mr. Lanier: Mark this for identification please.

(Thereupon, Plaintiff's Exhibit No. 28, is marked for identification by the Clerk.)

The Clerk: Plaintiff's Exhibit No. 28 is marked for identification.

(Testimony of Sandra Mae Nihill.)

Q. (Mr. Lanier, resuming): Now, Sandra, the jury is still complaining that they can not hear you. Now I know you can speak up louder than that. Will you do it? [141] A. I'll try.

Q. All right. Sandra, I show you Plaintiff's Exhibit 28, and ask you whether or not you have seen that exhibit before?

The Court: Now, you're talking to your lawyer back yonder and not the one standing beside you. You're got to get your voice up so they can hear you.

A. I believe that was in the box.

Q. Just answer yes or no first. A. Yes.

Q. All right. Now was it, or not, in the box you purchased? A. Yes, sir.

Mr. Lanier: At this time, may it please the Court, I offer into evidence Plaintiff's Exhibit 28.

Mr. Bradish: Just a minute. (Counsel examines Exhibit 28.)

Mr. Packard: I have the same objection, your Honor, it's hearsay, no proper foundation, insofar as the defendant Arnold Lewis is concerned. No foundation. It's hearsay.

Mr. Bradish: I have no objection. [142]

The Court: It will be admitted.

(Thereupon, Plaintiff's Exhibit No. 28, heretofore marked for identification by the Clerk, was received in evidence and made a part of this record.)

The Clerk: Plaintiff's Exhibit 28 admitted.

Q. (Mr. Lanier, resuming): Now, Sandra, just

(Testimony of Sandra Mae Nihill.)

prior to February 5, 1955, that's before that date, did you or not have occasion to have your picture taken? A. Yes.

Q. And what was that occasion?

A. The school gets our picture taken once a year.

Q. So your picture was taken. Do you remember how long before February 5, 1955?

A. Well not exactly.

Q. Approximately how long?

A. About three weeks.

The Court: About what?

The Witness: About three weeks.

The Court: About three weeks?

The Witness: Yes, sir. [143]

Q. (Mr. Lanier, resuming): And, also, Sandra, did you have occasion in the seventh grade, the year before, to have your picture taken?

A. Yes, sir.

Q. Would you mark that please sir?

The Clerk: Plaintiff's Exhibit No. 29 marked for identification.

(Plaintiff's Exhibit No. 29 was marked for identification by the Clerk.)

Q. (Mr. Lanier, resuming): Sandra, I show you Plaintiff's Exhibit 29, and I ask you, first of all, is that, or not, a picture of you? A. Yes, sir.

Q. And what year was that picture taken?

A. In the seventh grade, the year before.

Q. It was the year before the incident with the home wave? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: May it please the Court, I offer into evidence Plaintiff's Exhibit 29.

(Counsel for defendants examine said exhibit.)

Mr. Bradish: I wonder, if the Court please, if we might have the [144] year that this was taken, whether it was in 1954, or 1953.

Mr. Lanier: She stated the year 1955, your Honor; therefore, it's——

The Court: Let her answer the question directly, what year?

Q. (Mr. Lanier, resuming): What year was this taken, Sandra? A. In '54.

The Court: Did you hear the answer? You better keep your voice up, Sandra; it's pretty hard to hear. You have a soft voice and you better keep it up.

Mr. Lanier: 29 is offered, your Honor.

The Court: Admitted.

(Thereupon, Plaintiff's Exhibit No. 29, heretofore marked for identification, was received in evidence and made a part of this record.)

Mr. Lanier: At this time, may it please the Court, I request permission to pass this to the jury.

(Counsel hands the photograph, Exhibit No. 29 to the jury.) [145]

Q. (Mr. Lanier, resuming): Now, Sandra, again calling your attention to February 5, 1955, where was the permanent given you?

A. At my home.

Q. At your farm home? A. Yes, sir.

Q. And what part of your home were you in

(Testimony of Sandra Mae Nihill.)

at the time it was given? A. The kitchen.

Q. Is there, or not, a clock in the kitchen?

A. Yes, there is.

Q. What kind of a clock is it?

A. Electric clock.

Q. And where, generally, does it set in the kitchen?

A. It's right above the sink on the wall.

Q. Are you hearing her now? Hold that voice up now Sandra. Who was present in the kitchen at the time the wave was given?

A. My mother and Mrs. Briss.

Q. Now, I believe, at the time the permanent was given her name was Mrs. Briss, is that correct?

A. Yes, sir.

Q. Did her husband subsequently die?

A. Yes, he died.

Q. At the time we took her deposition, was she, or not, remarried? [146] A. Yes, she was.

Q. And what is her name now and at the time of the taking of the deposition?

A. Mrs. Alfred Jorgenson.

Q. So when we are referring to Mrs. Briss, it may be either Mrs. Briss or Mrs. Jorgenson?

A. Yes, sir.

Q. They are the same person? Don't nod now.

A. Yes, sir.

Q. Who actually applied the permanent?

A. Mrs. Briss.

Q. And what part did your mother play in it?

(Testimony of Sandra Mae Nihill.)

A. Well Mom mostly watched the clock and timed it.

Q. And did you participate other than having the wave given to you?

A. Well I helped watch time too.

Q. Within the kit itself there is a set of instructions. Is that correct? A. Yes.

Q. As you sit in the stand there now, Sandra, do you, yourself, specifically remember what those instructions were? A. No.

Q. Would you look at the set of instructions which I have taken from Exhibit 1. Look at those instructions [147] and tell me whether or not it calls to mind that those seem to be the instructions which you read and used.

The Court: If you need to, to refresh your mind.

A. I believe they are the same, yes.

Q. You say you believe they are the same.

A. Yes.

Q. All right. Prior to the use of the wave, Sandra, did you, yourself, read the instructions?

A. Yes, sir.

Q. And where were the instructions throughout the course of the permanent waving?

A. They were right on the cabinet there so we could look at them and check the time.

Q. And did you look at them during the course of the wave? A. Yes, sir.

Q. You referred to them from time to time?

A. Yes, sir.

(Testimony of Sandra Mae Nihill.)

Q. Did you, or not, strictly follow out the instructions that came in the container?

Mr. Bradish: That's objected to as calling for her conclusion, as being a self-serving statement. I have no objection if he asks her what she did in connection with the application of this permanent wave. [148]

The Court: I think the objection is well taken.

Q. (Mr. Lanier, resuming): Now, during the course of the——

The Court: Pardon me. Was this marked as an exhibit?

Mr. Lanier: No, it's within an exhibit, your Honor; it's contained in Exhibit 1.

The Court: All right.

Q. (Mr. Lanier, resuming): During the course —scratch. The bottle containing the liquid of the permanent wave, the solution, were you present at the time that bottle was removed from the package?

A. Yes, sir.

Q. Did you see it removed? A. Yes.

Q. Was it sealed at the time it was removed from the package? A. Yes, sir.

Q. Was the seal broken in your presence?

A. Yes, sir.

Q. Do you remember by whom?

A. I believe Mrs. Briss broke it.

Q. Did you notice anything at all unusual about the bottle? [149]

Mr. Bradish: I've got to object to that because it calls for a conclusion as to what "unusual" is,

(Testimony of Sandra Mae Nihill.)

I don't know. We have no objection if he asks her what she noticed about the bottle or observed about its condition, but "unusual" would be her conclusion.

Mr. Packard: I join. There's no proper foundation laid to show that there was any other type of hair——

Mr. Lanier: She so testified she has had permanents before, your Honor.

Mr. Bradish: Well, not certainly with this same type of kit, and there's no foundation that the bottles used in the other kits were the same as this.

The Court: I think perhaps the objection is well taken. You are inserting there the problem for her to solve there——

Mr. Lanier: I'll rephrase it, your Honor.

The Court: All right. [150]

Q. (Mr. Lanier, resuming): What did you notice about the bottle, if anything?

A. Before we opened it?

Q. After you opened it?

A. It was rather strong smelling.

The Court: Keep your voice up; I couldn't even hear you. Could you hear her back there in the corner?

Juror: Yes, sir.

The Court: Will the reporter read the answer?

(Thereupon, the pending answer was read by the reporter.)

Q. (Mr. Lanier, resuming): Did you notice anything else about it?

(Testimony of Sandra Mae Nihill.)

A. After you smelled it your eyes started smarting a little bit.

Q. You did notice that your eyes smarted?

A. Yes.

Q. During the course of the using of the solution, was there ever any time that it was poured over your head?

A. If I remember right it was.

Q. And where were you at the time that that took place?

A. I was standing over the sink.

Q. And, did you have anything else with you for protection, while you were at the sink? [151]

A. Had a towel.

Q. And what were you doing with the towel?

A. Holding it over my eyes.

Q. Over your eyes? A. Yes.

Q. That evening, did you, or not, go to bed with the pin curls in your hair? A. Yes.

Q. The next morning, did you, or not, notice anything about the pin curls?

A. They were rusty.

Q. Now by "rusty," will you tell the jury what you mean? Describe it a little bit more in detail.

A. Well when we took them out the next morning they were kind of covered with a little bit of rust, kind of red colored.

The Court: Will it develop that the pin curlers were in the container? I didn't understand.

Mr. Lanier: They are in the package, in Exhibit 1, your Honor.

(Testimony of Sandra Mae Nihill.)

Q. (Mr. Lanier, resuming): Was that just some of them or was it all of them?

A. Well all of the curlers.

Q. Now, Sandra, thereafter, when did you first notice that you were losing hair?

A. Well about—I don't know, it started coming out when [152] we combed it.

Q. When. A. About a week afterwards.

Q. And how long did that continue?

A. It kept continuing; it just kept coming out all the time.

Q. Well for about how long.

A. Well all the time, until I didn't have anymore to comb.

Q. About when did you graduate, do you recall?

A. The last part of May.

Q. Was it still in the process of coming out at that time? A. Yes.

Q. And when did you first go to see Dr. Martin?

A. I don't remember the date.

Q. Do you know about when you went?

A. It was about two weeks or so after we got the permanent when I first noticed it coming out.

The Court: About how long?

The Witness: About two weeks.

Q. (Mr. Lanier, resuming): After you noticed it coming out? A. Yes, sir. [153]

Q. And if Dr. Martin testifies that that was February 28th, does that sound about right to you?

A. Yes, sir.

(Testimony of Sandra Mae Nihill.)

Q. What did Dr. Martin give you to use, if you know? A. I don't remember the name.

Q. Did he give you something? A. Yes, sir.

Q. And did you use it? A. Yes, sir.

Q. As per his directions? A. Yes, sir.

Q. Did it, or not, help you in stopping any of the falling out? A. No, sir.

Q. About when was it that you had your Confirmation that Summer?

A. It was in June; about the first half of June.

Q. What was the condition of your hair at that time?

A. It was just about all gone. It was gone I guess.

Q. And is that about the first time that it was obviously gone? A. Yes.

Q. Do you remember when you went back to Dr. Martin? A. No I don't remember.

Q. If he testifies that it was July 5, does that sound about right? [154] A. Yes.

Q. And, as a result of that visit with Dr. Martin, did you, or not, eventually go in 150 miles to Fargo and see Dr. Melton? A. Yes.

Q. And you were under his care then for how long? A. I couldn't tell you that.

Q. You just don't know? A. No, sir.

Q. Did he prescribe any treatment for you?

A. I can't remember.

Q. Do you recall——

The Court: Wait a minute; what was her answer?

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: "I can't remember."

The Court: Keep your voice up, Sandra please.

Q. (Mr. Lanier resuming): Do you recall what instruction he gave you and what he told you the last time you were in?

Mr. Packard: Just a minute. I object to that on the ground it's leading, suggesting, it calls for her conclusion; there's no proper foundation laid that he gave any instruction. [155]

Mr. Bradish: And I object on the further ground that it is hearsay so far as this defendant is concerned.

The Court: Overruled. She may answer.

A. Well one time we went in to see him, he told me to go out in the sun and not to burn it though.

Q. By the way, Sandra, that brings up something that I had forgotten, have you ever in your life, at any time, applied any peroxide or any other bleaching agent to your hair? A. No.

Q. Have you ever used any hair dye or any other chemical in your hair? A. No, sir.

The Court: Did I understand you to say that Dr. Melton advised you to stay out in the sun?

The Witness: To go out in it.

The Court: To go out in the sun. I wasn't sure if it was to go in or stay out. All right proceed.

Q. (Mr. Lanier, resuming): Now, Sandra, at this time I wish you would please remove your kerchief.

(The witness removed a scarf which up to now was covering her head.)

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: Now, at this time also, your Honor, I don't want to embarrass the Court nor Sandra nor the jury nor counsel, any more than I have to, but because of the nature of the case, I am going to request that Sandra be allowed to walk, head down, in front of the jury, so that the jury can see, and if one of the ladies in the jury does not mind I would like for one of the jurors, at least, to examine the texture of this hair that is on Sandra's head. May I have that permission, your Honor?

Mr. Bradish: I am going to object to the jury examining the texture. It would seem to me that would be the proper subject of expert testimony.

The Court: I'll permit her to walk in front of the jury and exhibit her head in any way at all before the jury, but not permit the jury to touch or examine by manual—— [157]

Mr. Lanier: Thank you, your Honor. Sandra, would you step down here please? Walk just slowly, across the front.

(The witness left the witness stand and walked slowly across in front of the jury box, from one end to the other.)

Mr. Lanier: Now you can come on back and get in the chair.

Mr. Packard: I would like to take a look myself, if I may.

Mr. Lanier: You sure may.

(Mr. Packard and Mr. Bradish, attorneys for the defendants, also looked at the hair on plaintiff's head.)

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: You can just be seated Sandra.

(The witness resumed the witness stand.)

Q. (Mr. Lanier, resuming): Sandra, a few months ago, did you, or not, in Minneapolis, purchase a wig? A. Yes.

Q. And have you or not from time to time worn it and tried to wear it? A. Yes, sir.

Q. I ask you Sandra—one moment—I would like to request permission of the court and opposing counsel not to [158] mark this exhibit, because I do not want to put it in evidence because it is still usable.

Mr. Packard: I'll stipulate it may be withdrawn at the conclusion of the trial. I think the clerk should stamp it or in some way identify it.

Mr. Bradish: Does this young lady want to use it during the trial? If she does, I have no objection so long as it's here during the trial.

Mr. Lanier: I don't think she will use it during the trial. If counsel wants it marked I have no choice, I'll mark it.

Mr. Packard: No, I'm not insisting that it be marked, I don't mean that——

The Court: Well, it can be understood, can it not, that it's available for her use if she wants it?

Mr. Bradish: Yes, at any time.

Mr. Packard: Yes, sir.

Q. (Mr. Lanier, resuming): Sandra, I ask you whether—— [159]

The Court: So the record will be clear, it must be here at the time the matter is presented to the jury during argument.

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: All right, your Honor.

Q. (Mr. Lanier, resuming): I ask you whether or not that is the wig that was purchased?

A. Yes.

Q. Sandra, would you put it on please?

(The witness puts the wig on her head.)

Q. Sandra, where was that wig purchased?

A. In Minneapolis.

The Court: Voice up again, I couldn't hear you. I want to make sure the jury hears you—where?

The Witness: In Minneapolis.

The Court: In Minneapolis.

Q. (Mr. Lanier, resuming): And was that wig a stock wig or was it made up particularly for you?

A. Oh, I think they had it, it was already made.

Q. It was already made. And what was the cost of that wig, Sandra? A. $135.00. [160]

The Court: What?

The Witness: $135.00.

Q. (Mr. Lanier, resuming): Do you have any difficulty with it, Sandra? A. Yes.

Q. Would you tell the jury what happens when you go outdoors with it?

A. Well if it's windy it blows off.

Q. Have you been able to take care of it and keep it presentable?

A. I have to fix it all the time.

Q. All right. Now, Sandra, as a result of this—scratch. What year are you in high school now, Sandra?

A. Eleventh grade, junior high.

(Testimony of Sandra Mae Nihill.)

Q. So that next year you graduate?

A. Yes.

Q. As a result of this Sandra, has it, or not, caused you embarrassment? A. Yes.

Q. Has it hurt you? A. Yes.

Q. Sandra, do you have any boy friends? [161]

A. No.

Mr. Lanier: Your witness.

The Court: This may take a little time, perhaps I better let the jury withdraw for their convenience and try to be back in the box in ten minutes, if you can please. The jury will withdraw.

(Thereupon, a fifteen minute recess was taken, and, thereafter, the following proceeding were had in open Court:)

SANDRA NIHILL

resumes the witness stand for cross examination, as follows:

Cross Examination

Q. (By Mr. Packard): Sandra, when is the last time you saw a doctor for any type of examination to the scalp or your hair? I understand, yesterday, at about one o'clock, at my request, you saw a Dr. Harvey Starr, dermatologist in this city. Is that correct? A. Yes, sir.

Q. Now, before you saw Dr. Starr, who is the last doctor that saw you, either for an examination or treatment, before you saw Dr. Starr yesterday?

A. Dr. Levitt. [162]

Q. And is he located in Beverly Hills?

(Testimony of Sandra Mae Nihill.)

A. I believe so.

Q. And when did you see Dr. Levitt?

A. The days have been going too fast, I don't remember.

The Court: I don't think that anybody can hear you hardly. I can't. The lady there next to the end says she can't hear you, so make those jurors hear you so they will know what you are talking about. They have to pass on this case finally and if they don't know what you are talking about they won't have anything to think about. Keep your voice up. Make your uncle hear you back there, and your folks.

Q. (Mr. Packard, resuming): Sandra, as I understand, you live in North Dakota, is that correct? A. Yes.

Q. That's Kensal, North Dakota? A. Yes.

Q. And for the purpose of this trial you came out here to Los Angeles. When did you arrive in Los Angeles? A. Thursday.

Q. Thursday. Then after you arrived here, you saw a Dr. Levitt in Beverly Hills for the purpose of examining your hair and scalp. Is that correct?

A. Yes. [163]

Q. And was it since you arrived?

A. Yes, sir.

Q. And did Dr. Levitt prescribe any treatment to you? A. No.

Q. In other words, you went in there merely for an examination, he examined your scalp and your hair. Is that correct? A. Yes.

(Testimony of Sandra Mae Nihill.)

Q. And was your attorney present at that time?

A. I don't think he was.

Q. Did he go with you to Dr. Levitt's office?

A. I don't know, everything has been——

Q. You mean to tell me you don't recall whether Mr. Lanier or Mr. Rourke here accompanied you to Dr. Levitt's office in Beverly Hills or not?

Mr. Lanier: I don't think she understands your question.

Mr. Packard: Well I think it's clear.

Mr. Lanier: Whether I was there during his examination or just while I was in the office with her.

Mr. Packard: The question was, I asked whether Mr. Lanier accompanied her to Dr. Levitt's office in Beverly Hills within the last three or four days. Now do you understand that question, Sandra?

A. Yes. [164]

Q. And do you recall, at this time, whether your attorney accompanied you to Dr. Levitt's office or not? A. Yes, he did.

Q. He was with you? A. Yes.

Q. And at that time, did your attorney have a conversation with Dr. Levitt in your presence?

A. Not in my presence, no.

Q. And he talked to the doctor alone, is that correct? A. Yes.

Q. Now, prior to, or before, you saw Doctor——

The Court: May I suggest, so as to make this whole matter clear, that you ask her further whether the attorney was with her when the doctor

(Testimony of Sandra Mae Nihill.)

actually made the examination, or in the office, or the examining room?

Q. (Mr. Packard, resuming): Was your attorney present in the examining room?

A. No, sir.

The Court: I didn't know anything about it, but I thought in fairness to her it should be brought out.

Mr. Packard: I understood she said he was not there; that he was [165] there in the office but not in the examining room.

The Court: Well I didn't know.

Q. (Mr. Packard, resuming): Now, before you saw Dr. Levitt, who was the last doctor you saw for any type of treatment before that?

A. You mean an examination?

Q. Any type of examination or treatment, before you saw Dr. Levitt?

A. It would be Dr. Martin when we had our basket ball examination.

Q. Dr. Martin is your local home town doctor in Kensal, North Dakota, is that correct?

A. Yes.

Q. And before you saw Doctor—the last doctor you saw before Dr. Levitt, was Dr. Martin. Is that correct? A. Yes, sir.

Q. And what was the date of that examination or visit to Dr. Martin's office?

A. I couldn't tell you.

Q. You say that was for an examination in connection with a basket ball tournament in which you

(Testimony of Sandra Mae Nihill.)

were playing for the high school in Kensal, North Dakota? A. Yes, sir.

Q. And was that sometime this year?

A. Yes, sir. [166]

Q. How often do you have these tournaments?

A. Well, the tournament we have at the end of the basket ball season.

Q. In other words, after the regular basket ball season, you have a tournament between the various schools there which I imagine takes a couple of days to play off. Is that correct? A. Yes, sir.

Q. And before these tournaments, you received a medical examination, or examination by Dr. Martin, all the girls on the team, is that a correct statement? A. Yes, sir.

Q. I'm trying to correlate this and go back. As I recall your testimony, you have seen Dr. Martin approximately one week before you received this home permanent in 1955, for an examination before the basket ball tournament at that time. Is that correct? A. Yes, sir.

Q. And I take it then that since 1955, you have been playing basket ball on your local high school team, and prior to or before these tournaments, Dr. Martin examines all the girls on the team?

A. Yes, sir.

Q. And that then took place sometime probably in February, is that correct?

A. Approximately. [167]

Q. So, then, does that refresh your recollection that, in all probability, the last time you saw Dr.

(Testimony of Sandra Mae Nihill.)

Martin was sometime in February of this year, at which time he examined you for this basket ball tournament? A. Yes, sir.

Q. And I take it then that in 1956 and 1957, you received a like examination from Dr. Martin just before this basket ball tournament?

A. Yes, sir.

Q. Now, at the time you were examined by Dr. Martin—strike that—at the time you were examined by Dr. Martin in February this year, that was merely an examination so that you could play basket ball in this tourament?

A. Well, it was general.

Q. Yes. He didn't prescribe any treatment to you insofar as your hair was concerned, did he?

A. No, sir.

Q. When was the last time—strike that. Now, I take it from time to time, you go to a barber for a neck trim, to trim your hair? A. No, sir.

Q. Is it your testimony that you have not been to any barber since February 1955?

A. I don't believe I went to a barber—— [168]

The Court: I don't believe the reporter can hear you.

A. I don't believe I went to a barber at that time.

Q. What I'm getting at, have you been to any barber? A. No, sir, not a barber.

Q. Well, I take it that some member of the family or somebody, does the chores in Kensal, North Dakota, for members of the family insofar as hair-do's and hair-cuts. Is that correct? In your

(Testimony of Sandra Mae Nihill.)

immediate family, does somebody pick up the scissors, the shears, for your brothers or your sisters and so forth? A. No.

Q. Do you go to a barber, your brothers or sisters? A. Well, my brothers go to barbers.

Q. All right. Now how about yourself——

The Court: Do I understand that question and answer to be—I think I do—you asked her if she had been to a barber, a professional barber I assume you meant?

Mr. Packard: Yes, sir.

The Court: Since February 5, 1955.

Mr. Packard: That is right. [169]

The Court: And her answer was "no"?

Mr. Packard: That is correct.

The Court: All right, proceed.

Q. (Mr. Packard, resuming): Now, has anybody, including yourself, trimmed your hair or cut your hair at any time since February 5, 1955?

A. No, sir.

Q. And it's your testimony that there has never been a scissors or shears used upon your hair since February 5, 1955. Is that a correct statement, Sandra? A. Yes.

Q. Now, I believe you have stated that prior to, or before February 5, 1955, you had used other home permanents, or somebody had given you a cold wave permanent. Is that correct?

A. Yes, sir.

Mr. Lanier: Speak up, Sandra. You are getting a little low again.

(Testimony of Sandra Mae Nihill.)

Mr. Packard: Where is that picture, the photo? Now, let me [170] ask you, Sandra, prior to or before you had this home permanent, was your hair naturally straight or curly?

A. Straight.

Q. It was naturally straight, is that correct. And I show you a photograph which I believe the testimony is was taken in 1954, when you were in the seventh grade, and it has been marked "Plaintiff's No. 29". I call your attention to that photograph and ask you if that photograph was taken immediately after, soon after, you had received a home permanent or some type of permanent?

A. Yes, it was.

Q. And do you know at that time, the type of home permanent you had received?

A. On that picture?

Q. Yes. A. That was a Toni.

Q. That was a Toni. Do you know what type of Toni home wave? A. No, I don't.

Q. Where did you purchase the Toni?

A. I can't remember that either.

Q. Did you purchase it at the same drug store in Kensal?

A. I really don't remember. [171]

Q. Did you personally purchase it?

A. It's too far back.

Q. You don't have any recollection?

A. No, sir.

Q. But you are certain that it was a Toni?

A. Yes, sir.

(Testimony of Sandra Mae Nihill.)

Q. Do you recall reading the directions in the Toni kit? A. Yes.

Q. Was there a specific type of Toni wave that you purchased? A. I don't remember.

Q. Well, this particular Cara Nome pin curl permanent, were you aware of the fact that there were different types of home cold wave permanents put out under the name of "Cara Nome"?

A. I never really looked at permanents before.

Q. You didn't look at the box you mean?

A. Well we looked at the different brands, yes.

Q. And is it your testimony there were different brands at the Kensal Drug Store?

A. There were different brands of permanents, yes.

Q. And you selected—what I'm asking you now, were you aware of the fact that they had different types of Cara Nome home cold wave permanents?

A. I don't remember.

Q. What I am getting at, this is a pin curl permanent, which is to curl the ends, and they have a natural, and they have a mild one, and they have various types of Cara Nome cold wave permanents, and I am wondering whether you examined the various types before you selected the pincurl permanent?

A. Well we went in with the idea of getting a pincurl.

Q. And you say you went in with the idea of getting the pincurl, so when you went in there you had in mind what you were going to purchase at

(Testimony of Sandra Mae Nihill.)

that time. Is that correct? A. Yes, sir.

Q. And was that by reason of the fact that somebody had recommended this particular type of pincurl to you? A. No.

Q. In other words, you had heard about it, is that correct? A. Yes.

Q. And you had heard about it before you went in to the drug store in Kensal, North Dakota—you were aware of it before you went in, that's correct isn't it, Sandra? Is that correct?

A. I guess so. [173]

Q. All right. Now, from where did you obtain your source of information relative to this particular type of home permanent before you went in to the drug store?

A. I couldn't tell you.

Q. You don't recall? A. No.

Q. All you recall you went in to buy this particular brand—right?

A. We went in to get a pincurl.

Q. Yes, you wanted to get a pincurl, and you realized that there is a difference between receiving a regular pincurl permanent and a natural permanent? A. Yes.

Q. And I take it that you had had these cold wave permanents before? A. Yes.

Q. And had you had any other type other than a pincurl? A. Yes, sir, we had.

Q. And what type of permanent—when I say "type of permanent", what type relative to whether it was a pincurl or whether you blocked your hair

(Testimony of Sandra Mae Nihill.)

off and had a full-head—do you understand—permanent—what type was it in that picture, Plaintiff's No. 29? [174]

A. Well they had some kind of little curlers.

Q. They had some plastic curlers that you wound your hair around, those plastic curlers, is that correct? A. Yes.

Q. And the last permanent you received with these plastic curlers—strike that, I don't believe that was the evidence—was the last permanent you received prior to or before February 5, 1955, given with plastic curlers? A. Yes, sir.

Q. And do you know what brand that was?

A. That was a Toni.

Q. Now, was that the same one at the time your picture was taken?

A. On that picture there?

Q. Yes? A. Yes.

Q. Now, by whom were you given this?

A. Mrs. Briss and my mother.

Q. The same two ladies that were present there at the time you received this cold wave on February 5, 1955? Is that correct?

A. Yes, sir.

Q. Did you read the instructions yourself?

A. On which one?

Q. On the Toni? A. Yes.

Q. And were you familiar with the instructions on the Toni at the time you had this Cara Nome?

A. I couldn't you what they were.

Q. Did you personally read all the instructions?

(Testimony of Sandra Mae Nihill.)

A. Well everybody read them.

Q. Everybody——

The Court: You are referring now to which one?

Q. Did you personally read the instructions on the Cara Nome? A. Yes.

Q. And you say everybody read them, did——

A. I meant mom and Mrs. Briss.

Q. Did they read them out loud?

A. Yes.

Q. And who read it out loud?

A. Mrs. Briss.

Q. And then you read it yourself?

A. Yes.

Q. Did you see your mother read it herself?

A. Yes.

Q. Now did you completely read the instructions before the cold wave was commenced? [176]

A. Yes.

Q. Did your mother, to the best of your knowledge, completely read the instructions before the cold wave was commenced? A. Yes.

Q. Did Mrs. Bliss read it out loud before the cold wave was commenced? A. Yes, sir.

Q. Now, going back to the Toni, was the same procedure followed insofar as the giving to you of the cold wave at that time, relative to the instructions, I'm referring to?

A. Well they read them.

Q. You are aware that they had read them. Did they read them out loud?

(Testimony of Sandra Mae Nihill.)

A. I don't remember that.

Q. Now, at the time that you received the Toni, that wave differed from this Cara Nome in that on the Cara Nome your hair was placed in pincurls, where in the Toni, it was placed over these rollers —plastic deals—is that correct? A. Yes.

Q. And at the time you received the Toni, your hair was more or less blocked off. Isn't that correct? In blocks, and then wrapped around these rollers? [177]

A. I couldn't tell you sir.

Q. You don't recall. Then, is it your testimony that the only home permanent cold wave before the one on February 5, 1955, was a Toni?

A. That's the only brand I can remember.

Q. You may have had others, but you don't recall, is that correct?

A. (Nods head affirmatively.)

Q. In other words, if you had some others which you don't recall, you at least don't recall the name being other than "Toni". Is that a correct statement? A. Yes.

Q. And, as I understand it, you had this home permanent because you were going to play in this basketball tournament and you wanted your hair to look nice because you were going to play in the basketball tournament. Is that correct?

A. Yes.

Q. And was this a girls' team? A. Yes.

Q. This was one of the big occasions, is that

(Testimony of Sandra Mae Nihill.)

correct, in North Dakota, as far as social activities and athletic activities at school?

A. Well we always have them. [178]

Q. And you looked forward to it, is that correct? You had looked forward to it?

Mr. Lanier: If the Court please, I'm going to object to this as cluttering the record, being totally immaterial. I've listened for quite awhile and it's just getting to be repetitious and serves no purpose in this lawsuit.

The Court: Well, treat the matter briefly——

Mr. Packard: I have a purpose, Your Honor, in mind.

The Court: Very well, proceed.

Q. (Mr. Packard, resuming): Is that correct, that you looked forward to this for sometime—these tournaments every year?

A. Well we always look forward to them.

Q. Now, do you recall that while you were being given this home permanent—now I'm talking at all times about the Cara Nome, I'm not talking about the Toni any more, you understand that, Sandra?

A. Yes.

Q. At the time you were receiving this home permanent on February 5, 1955, do you recall holding a towel over your forehead? [179]

A. Yes.

Q. And there wasn't any of the solution that got into your eyes, was there?

A. I don't really recall; the towel was on.

(Testimony of Sandra Mae Nihill.)

The Court: I can't hear you. Keep your voice up.

Mr. Packard: Have the depositions been filed counsel?

The Court: They are on my desk I think.

Mr. Packard: I would like to use a deposition at this time.

(Thereupon, the clerk left the court-room and went into the Judge's Chambers and returned with the depositions in question.)

Q. After your hair commenced to break off and you had this trouble with your hair, do you recall also that your eye lashes fell out?

A. My eyebrows fell out.

Q. Do you recall your eye lashes had fallen out at the time that you went to see Dr. Michaelson in Minneapolis? A. It become awful thin.

Q. Will you please speak up Sandra because the jurors here are having a difficult time hearing you and it's difficult for me to hear you sometimes. I'm asking you [180] about your eye lashes now?

A. Well they become awful thin.

Q. They thinned out, is that correct? There definitely was a change in your eye lashes after this trouble to your hair? A. Yes.

Q. Now, I——

The Court: Pardon me. Do I understand that your eyebrows come out?

The Witness: Yes.

The Court: Entirely?

The Witness: Well, yes.

(Testimony of Sandra Mae Nihill.)

The Court: But your eye lashes only in part, is that right?

The Witness: Umhum.

Mr. Packard: Well I'm not sure Your Honor; she didn't say, she said that her recollection was, well let me ask——

The Court: She said they thinned out. [181]

Mr. Packard: The record will speak of itself.

The Court: I'll speak for it too, when I want to, counsel.

Q. (Mr. Packard, resuming): All right, now, do you recall, when you went to Dr. Michaelson that your eye lashes had practically all fallen out. Do you recall that?

A. No, sir, I can't.

Q. But——

The Court: Do you wish to have these depositions opened at this time?

Mr. Packard: Yes, I would like the deposition of—well we might as well have all of them open——

The Court: Do you have any objection to having all of them being opened?

Mr. Lanier: I have no objection to their being opened.

The Court: Open all of them.

(Thereupon, the Clerk opened the depositions which had been in sealed envelopes up to this time.) [182]

Mr. Packard: Counsel, will you stipulate that the necessary foundation has been laid for the purpose of reading the deposition, or do you wish for

(Testimony of Sandra Mae Nihill.)

me to approach the stand and confront the witness with her deposition?

Mr. Lanier: Well, now, may it please the Court, I don't know exactly what counsel wants me to stipulate to. Under the Federal Rules, of course, all depositions are admissible unto either party. If he wants to offer the entire deposition and read it, I have no objection. If he wants to go question and answer, I have no objection at all. Do you want to offer the deposition, counsel, or——

Mr. Packard: I'm not offering it; I'm using them for impeachment purposes, Your Honor, at this time. Do you stipulate that I may use a copy——

Mr. Lanier: Yes, so far as reading from it.

Q. (Mr. Packard, resuming): Sandra, I show you your deposition which was taken in Jamestown, North Dakota, August 1, 1957, and I show you therefrom, on page 8 commencing on line 18——

Mr. Lanier: May it please the Court, I now object to this form of [183] questioning. I object to the form of it as being an improper method of impeachment and, as counsel well knows, he can read the question and answer and ask her if she made such question and gave such answer.

The Court: That's the usual procedure.

Mr. Packard: I'm asking her first to read it to herself, without saying anything, and then I'm going to read it. I'm laying the foundation. Counsel would not stipulate that the foundation had been laid.

(Testimony of Sandra Mae Nihill.)

The Court: I thought he had stipulated. He said you could use your copy for impeachment purposes.

Mr. Lanier: I have no objection, Your Honor, to any foundation or anything else. He can put the whole deposition in, but if he is using it for impeachment, which he has a right to do, I only want him to do it in the proper way.

Mr. Packard: That's what I'm doing, in the proper way, Your Honor.

Mr. Lanier: I object to it, Your Honor. [184]

The Court: Well, ask her——

Mr. Packard: May I proceed, Your Honor.

The Court: You may ask her the questions.

Mr. Packard: I'm going to ask her to read to herself those questions and then I'm going to ask her whether those questions——

The Court: There has been an objection made, so we'll sustain the objection.

Q. (Mr. Packard, resuming): Do you recall that at the time your deposition was taken, Sandra, August 1, 1957, in Jamestown, North Dakota, that you were asked the following question—I'm reading from page 8, line 18—

"And where did you hold the towel?"

Answer—"I tried holding it over my eyes."

Question—"And did you get any of the solution in your eyes?"

Answer—"Well, not in them." [185]

Do you recall being asked those questions and giving those answers at the time your deposition was taken?

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: Now, may it please the Court, I object. Obviously being used for the purpose of impeachment and I have no idea what possible impeachment purposes——

Mr. Packard: Well that's a question for the jury to determine.

Mr. Lanier: There is no testimony by this witness to the contrary, your Honor.

Mr. Packard: She said she doesn't recall whether any of it got in her eyes or not. I think it's a question for——

The Court: Well, I'll permit the question and answer to be put to the witness.

Mr. Packard: Your Honor, I have just——

The Court: I say I'll permit; I'll permit it; go ahead.

Mr. Packard: Do you want me to reframe the question?

The Court: No, no; no. Your question is already put——

Mr. Packard: I didn't get an answer. [186]

The Court: All right Sandra, answer the question? A. Yes.

The Court: She says yes. Now you understand that you are saying that those questions were asked of you and you gave those answers?

The Witness: Yes.

The Court: All right, Mr. Packard.

Q. (Mr. Packard, resuming): Now at the time that you received this cold wave on February 5, 1955, did you have any feeling or sensation, burn-

(Testimony of Sandra Mae Nihill.)

ing sensation or any sensation of the solution being on your head?

A. On my head, no sir.

Q. You didn't have any burning sensation or feeling while it was being given to you?

A. No.

Q. Now, I believe you stated that you let the pincurls on all night. Is that correct?

A. Yes, after we rinsed it we left it on all night.

Q. And the last thing that occurred was that the solution was poured on your head and then after it stood a certain period of time then it was washed off. Is that correct? [187]

A. I can't recall——

The Court: Well I can't tell what you're saying at all.

The Witness: Well I can't recall the directions exactly.

Q. Well I'm not asking you to tell me what the directions are; I'm asking you to tell me what you best recall at this time of what took place at the time this cold wave was given to you. Do you understand that, Sandra?

The Court: Frame the question again, and see if she can't answer it.

Q. My question was, I believe you testified on direct examination that the last thing that was done, so far as giving the whole home permanent, was that the solution was poured all over your head, stood for a certain period of time and then

(Testimony of Sandra Mae Nihill.)

it was rinsed off, washed off, and then you permitted the pincurls to remain in your hair all night. A. I believe that's right.

The Court: Let me get it straight. Do I understand the pincurls were put in subsequent to the rinsing and then permitted to stay all night, or were they put in previous to the rinsing? [188]

A. I believe we took them out and then rinsed it.

The Court: Took them out and then rinsed it, all right.

Q. (Mr. Packard, resuming): Do you definitely recall taking the pincurls out?

A. Well it seems to me—well I don't recall exactly.

Q. In other words the pincurls, your hair was placed in pincurls with these bobby curls before anything was done? When I say that, was your hair shampooed first?

A. Well the directions says to shampoo it.

Q. Well I'm not asking you what the directions says Sandra. I'm asking you, did you shampoo your hair? A. Yes.

Q. And what type of shampoo did you use?

A. I don't remember.

Q. Did you use a shampoo out of a bottle or did you use a soap. When I say a soap, I realize soap comes in bottles, but I mean a cake soap, or did you use some type of shampoo out of a bottle?

A. I believe it was out of a bottle.

(Testimony of Sandra Mae Nihill.)

Q. Do you recall whether it was out of a bottle, or a cake?

A. I never used a cake, so it must have been out of a bottle.

Q. Now, was your hair trimmed or cut at any time before [189] you were given this home permanent? A. I don't remember.

Q. You don't recall whether your mother or Mrs. Briss cut your hair, cut the ends off?

A. No.

Q. Then——

The Court: The answer is you don't remember, is that right?

The Witness: Yes.

The Court: All right. Proceed.

Q. (Mr. Packard, resuming): Then, as I understand, your hair was shampooed, and then was it dried? A. I believe it was.

Q. And whereabouts was your hair shampooed?

A. In the kitchen.

Q. And who shampooed your hair?

A. I did.

Q. You shampooed it yourself?

A. Yes, sir.

Q. Was your mother and Mrs. Briss present at that time? A. Yes.

Q. And what were they doing at that time?

A. I couldn't tell you that. [190]

Q. Then did you dry your hair yourself?

A. Yes.

Q. Then after your hair was dry, it was put up

(Testimony of Sandra Mae Nihill.)

in these pincurls with bobby pins, is that correct?

A. Yes, I guess it was.

Q. I'm not asking you to guess; if you don't recall, you can say you don't recall Sandra. Do you recall? A. No, sir.

Q. In other words, you don't recall whether your hair was put up with the bobby pins before any solution was put on or not, is that correct; you don't recall at this time? A. No.

Q. That is a correct statement I made?

A. Yes.

Q. You will have to speak up. In other words my statement was correct, is that correct?

A. Yes.

Q. Did you observe the mixing of any of this solution? A. Yes, I watched it.

Q. Now the solution that was put on your head, was this out of the bottle?

A. I couldn't tell you.

Q. You don't recall. You don't know what they poured it on your head out of? [191]

A. No, sir.

Q. Now, do you recall that during the giving of this permanent to you, there was some discussion that there had been an error in the timing?

A. Well the only error was we were going to start rinsing it before the time was up.

Q. You recall that they started rinsing it, or doing something, before the time was up and then they permitted the solution to remain on your hair fifteen more minutes. Do you recall that?

(Testimony of Sandra Mae Nihill.)

A. No, sir.

Q. How long was it?

A. Well they were going to start, and it was about two minutes before the time to rinse, and they didn't start, they just waited until the time was up.

Q. You don't recall anything about fifteen minutes? A. No, sir.

Q. If Mrs. Briss gave a statement "I started to rinse——

Mr. Lanier: One moment. One moment, may it please the Court. I object to any statement, not in evidence, being given by Mrs. Briss, until such statement is in evidence.

Mr. Packard: I'll offer the statement in evidence at this time.

Mr. Lanier: Objected to, there is no foundation laid. [192]

The Court: Objection sustained at this time. I assume you intend to use Mrs. Briss.

Mr. Packard: I thought Mrs. Briss, you said, was going to be here.

Mr. Lanier: You thought I said Mrs. Briss was going to be here, yet I take her deposition. Her deposition is here and in due time it will go into the record, counsel.

Mr. Packard: I have notice in my file, you said Mrs. Briss would be here.

Mr. Lanier: You have no notes in your file, gotten from me, that Mrs. Briss would be here. That is why I took her deposition in North Dakota.

(Testimony of Sandra Mae Nihill.)

Your North Dakota counsel are well aware of that fact. I didn't take a deposition of Sandra, I didn't take one of her mother, because they were going to be here. The rest were taken.

Mr. Packard: I have a letter, you said all witnesses would arrive April first——

Mr. Lanier: All witnesses would arrive April first. All witnesses [193] did arrive April first. Did you think I was bringing my doctor——

Mr. Packard: I am entitled to ask this witness as to whether—just one second. (Counsel confers with Mr. Bradish.)

Q. (Mr. Packard, resuming): Did you hear Mrs. Briss make the statement that she was fifteen minutes off on her timing, therefore——

Mr. Lanier: One moment——

The Court: Just let him finish his question.

Q. (Mr. Packard, continuing): Do you recall Mrs. Briss making the statement that she was fifteen minutes off on her timing; that she started to rinse your hair, do you recall her making that statement?

The Court: Don't answer that, don't answer that please.

Mr. Lanier: One moment, if the Court please, because counsel has now made this statement, I am going to withdraw my objection to this one question only and allow her to answer it, but by doing that I don't waive my objection to this line of testimony. [194]

The Court: Well, I think this is a proper ques-

(Testimony of Sandra Mae Nihill.)

tioning because it's an effort to refresh the mind of the witness and if she didn't hear it or if she still says "no," why she has a right to say that, but if it refreshes her mind and she does want to make a different statement about that, then she has the opportunity.

Mr. Lanier: My point is this, your Honor, we have here the deposition of Mrs. Briss, Mrs. Adaline Jorgenson. Counsel's office was represented by competent counsel, she was cross examined, examined, re-examined and re-crossed. The whole deposition of her testimony is here and there is no such ridiculous statement as fifteen minutes on anything and they had the opportunity——

Mr. Packard: Well I have a statement from her. If counsel makes such statement, I'll stipulate that her statement can go into evidence. I have a notarized statement——

Mr. Lanier: Of course that would be objected to, your Honor.

The Court: Not unless it's in the deposition, Mr. Packard, I [195] don't think you are entitled——

Mr. Packard: Counsel says there isn't any such statement and he made that statement in front of the jury and I have the statement right here, if he wants——

Mr. Lanier: I'm not interested in counsel's statement. There is no opportunity for cross examination or explanation. Counsel well knows it, he has been trying lawsuits enough. He has the deposition and that's all he can use.

(Testimony of Sandra Mae Nihill.)

The Court: I still think he, if he thinks and if he believes and if he knows—anyway you put it —that she made, or if he has a strong belief that she made such a statement, then I think he has the right to ask her if she heard her make that statement.

Mr. Lanier: I have no objection to that one question, your Honor. I'll withdraw my objection.

The Court: All right. Then, let's proceed.

Q. (Mr. Packard, resuming): Did you at any time hear Mrs. Briss make the statement "We just followed the directions on the permanent box, [196] washed her hair first and put her hair up in pin curls and put in the solution like it called for. I started rinsing it out fifteen minutes before it was supposed to. I happened to think about the time before I got it all rinsed out and then I left the rest in until the time was up." Now, do you recall Mrs. Briss ever making that statement in your presence? A. No.

Q. You don't recall her making that statement at any time, is that correct? A. Yes.

Q. Now, after you received this home permanent, the first time you saw a doctor was Dr. Martin, is that correct, on February 28, 1955? A. Yes.

Q. And that was Dr. Martin in Kensal, North Dakota? A. Yes, sir.

Q. And he is your local doctor?

A. Yes, sir.

Q. Now, he examined your hair at that time, Sandra? A. Yes, he looked at it.

(Testimony of Sandra Mae Nihill.)

Q. Then he prescribed selsum. Do you recall that? A. Well he gave me something.

Q. Did he give you something or did he write you a prescription?

A. I think he gave us a prescription. [197]

Q. And did you fill that prescription?

A. Yes, sir.

Q. Whereabouts?

A. It would be our local drug store.

Q. And did you use the selsum on your hair?

A. Yes, sir.

The Court; What is that word, Mr. Packard?

Mr. Packard: (Spelling) S-e-l-s-u-m, I believe it's spelled. Selsum.

Mr. Lanier: (Spelling) S-e-l-s-a-m, your Honor.

The Court: (Spelling) S-e-l-s-a-m?

Mr. Lanier: Yes, your Honor.

The Court: Thank you.

Q. (By Mr. Packard, resuming): Now, when did you first use this selsum solution?

A. Right after he told us.

Q. Beg pardon?

A. Right after we got it.

Q. Well I mean did you use it the next week or two weeks [198] later, a month later—when did you use it?

A. It ought to be the same day I suppose.

Q. Used it the same day? A. Yes, sir.

Q. Will you please explain to the jury just how you used the solution?

A. I couldn't tell you.

(Testimony of Sandra Mae Nihill.)

Q. You don't recall how you used the solution the doctor gave you—and this was the time when your hair was all falling out and the first treatment you received, isn't that correct?

A. The directions were on the bottle.

Q. Well, I know, but you don't recall what you did, so far as the use of this selsum? A. No.

Q. It's your testimony though that you used it the first day? A. Well, I believe——

Q. Did you put it in your hair? A. Yes.

Q. And did you wash your hair first?

A. I couldn't tell you.

Q. Then, did you use it at any time after the first day? A. Well, yes.

Q. And when was the next time you used it after the first day you saw Dr. Martin? [199]

A. Well, I don't remember.

Q. Did you use it at any time after the first day you saw Dr. Martin, after the cold wave on February 5, 1955? What I'm getting at—strike that question—did you use it at any time after February 28, 1955? A. Well, yes.

Q. But you don't recall when?

A. Well, we used it right after Doc Martin gave it to us.

The Court: Pardon me. Was the 28th the day she made——

Mr. Packard: She saw Dr. Martin on the 28th, he was the first doctor she saw after this cold wave —that is correct, isn't it Sandra? A. Yes.

(Testimony of Sandra Mae Nihill.)

Q. And on that date you used some of this selsum on your hair? A. Yes.

Q. Now, what I want to know is when did you use it again?

A. Well, I couldn't tell you.

Q. You haven't any idea? A. No, sir.

Q. Did you use it at any particular intervals, or any particular time? [200]

A. I believe that you weren't supposed to use it too close.

Q. But you don't recall? A. No, sir.

Q. When did you stop using it?

A. Well, after my hair was gone.

Q. And when was that? A. By June.

Q. 1955? A. Yes.

Q. Now, since that date, have you used anything on your hair?

A. Well, just—the doctor said use a little oil.

Q. A little baby oil or something like that?

A. No, well when it was dry the doctor said use a little oil.

Q. Well what type of oil did you use?

A. Well some Wild Root.

Q. Wild Root hair oil? A. Yes.

Q. And wasn't he the doctor that prescribed wild root hair oil to you?

A. He didn't prescribe it. He said that it would be all right to use it if it's dry.

Q. And your hair was dry at that time, is that correct? [201] A. That was after——

Q. After what?

(Testimony of Sandra Mae Nihill.)

A. Well my scalp was dry after all the hair fell out.

Q. And when did you first notice that your scalp was dry? A. Well, it——

Q. You don't know?

A. I don't know, I couldn't tell you.

Q. But you do know that your scalp was dry around in June, July and August of 1955?

A. It was dry before that too.

Q. Did you put anything on your hair when you noticed your scalp was dry? A. No.

Q. Well, you observed that your hair was continuing to fall out after you saw Dr. Martin on February 28, 1955, is that correct?

A. Yes, sir.

Q. Then, did you see any doctor after February 28, 1955, until you saw Dr. Martin again on July 6, 1955? A. No.

Q. Did you seek or obtain any treatment insofar as your hair or your head condition was concerned, from the time you saw Dr. Martin on February 28, 1955, until [202] July 6, 1955?

A. Well, we put that liquid he gave us on it, that selsum.

Q. But you didn't go back to him?

A. No, sir.

Q. Then your testimony is the only treatment is you continued to use the selsum from February 28, 1955, to July 6, 1955. Is that a correct statement, Sandra? A. Yes.

(Testimony of Sandra Mae Nihill.)

Q. Then, after you saw Dr. Martin on July 28, 1955, he conducted a further examination——

Mr. Lanier: Incorrect statement, counsel.

Q. July 6, 1955. He examined your hair again and referred you to Dr. Melton in Fargo, North Dakota. Is that correct? A. I believe.

Q. And when did you see Dr. Melton in Fargo, North Dakota? A. I don't recall the date.

Q. Do you recall the date counsel?

Mr. Lanier: I can give it to you, counsel. August 9, 1955.

The Court: What's the name of the doctor?

Mr. Packard: Melton.: (Spelling) M-e-l-t-o-n, I believe. Is that correct, counsel?

Mr. Lanier: That's correct.

Q. (By Mr. Packard, resuming): Now, between July 6, 1955, and August 9, 1955, did you use any type of medication or receive any type of treatment to your hair? A. No.

Q. Did Dr. Martin, when you saw him on July 6, 1955, give you any further prescriptions, or prescribe any type of treatment to you? A. No.

Q. He just merely referred you to another doctor? A. Yes, sir.

Q. Then, how many times all together did you see Dr. Melton in Fargo, North Dakota?

A. I couldn't tell you.

Q. Well, do you recall whether you saw him two or three times, twenty times, a hundred times? Your best recollection, Sandra?

A. About four times I imagine.

(Testimony of Sandra Mae Nihill.)

Q. About four times. When was the last time that you saw Dr. Melton for any type of examination or treatment? A. I don't recall. [204]

Q. Well was it before Christmas 1955, or before the next basketball tournament in 1956, can you use that to—— A. Dr. Melton?

Q. Melton in Fargo?

A. Well the last time I can recall seeing him it was in the Spring of the year, I can remember that.

Q. Now——

The Court: Can you hear that, Mr. Packard?

Mr. Packard: She said the Spring of some year, I didn't quite——

Q. (By Mr. Packard, resuming): How far is Fargo from Kensal?

A. A hundred and ninety miles.

Q. A hundred and nine miles? A. Ninety.

Q. Ninety. Now did you receive any prescriptions or any treatment from Dr. Melton the first time you saw him on August 9, 1955?

A. I can't recall. I don't believe so.

Q. Do you recall the next time you saw Dr. Melton after August 9, 1955?

A. No, I don't recall.

Q. Do you recall any prescriptions or any treatment he gave you at any time while you were seeing Dr. Melton? [205]

A. Well, I believe he gave me some pills once.

Q. Do you know what type of pills he gave you? A. No.

(Testimony of Sandra Mae Nihill.)

Q. Did he give you anything to put on your hair? A. I can't recall.

The Court: Keep your voice up, Sandra.

Mr. Packard: Your Honor, maybe this would be a good time to adjourn for lunch.

The Court: Very well. Court will stand in recess—don't move yet—until two o'clock. The jury may withdraw, of course, under the same injunction as heretofore, you are not to talk to anybody or let anybody talk to you. Court will stand in recess until two o'clock.

(Whereupon, at 12:05 P.M., the hearing was adjourned until 2:00 o'clock P.M.) [206]

Afternoon Session

Whereupon, at the hour of 2:05 o'clock p.m., the hearing in the within cause was resumed pursuant to the noon recess heretofore taken, and the following further proceedings were had in open court:)

The Court: The witness may resume the witness stand.

Thereupon,

SANDRA MAE NIHILL

resumed the witness stand for further cross examination, as follows:

Mr. Packard: I don't have any further questions at this time, your Honor.

The Court: All right. Do you have any questions?

(Testimony of Sandra Mae Nihill.)

Mr. Bradish: Yes, a few your Honor.

Cross Examination

Q. (By Mr. Bradish): Miss Nihill, on the day that you went into this drug store in Kensal, North Dakota, did you go in for the specific purpose of buying a cold wave solution to do your hair? [207]

A. Yes.

Q. Do you know who the owner of that drug store is? A. I believe it's Herman Olig.

Q. It is who, ma'am?

A. I believe Mr. Herman Olig.

Q. I can't hear you, you better talk up a little?

A. Mr. Olig.

Q. How do you spell it please?

A. (Spelling) O-l-i-g.

Q. Herman Olig? A. Yes, sir.

Q. And is that the only drug store in the town?

A. Yes.

Q. And isn't that drug store, doesn't it have a sign out in front that says "Olig's Rexall Drug Store"? A. I don't recall.

Q. All right. Now, before going into this drug store on that particular day, you had on previous occasions, used some different types of cold wave solution on your hair, hadn't you?

A. Probably have.

Q. Do you know how many times before you went into the drug store to get the Cara Nome that you had purchased different types of cold wave solution for your hair? A. No, sir. [208]

(Testimony of Sandra Mae Nihill.)

Q. Well, was it more than once?

A. Well I believe so, I don't know if they were all cold waves or if I got them in the beauty shop.

Q. Well, maybe you can tell me this, before February 5, 1955, how many times had you had a cold wave treatment to your hair at home?

A. Only that one other time I can recall.

Q. Just the one other time? A. Yes, sir.

Q. And that was when you were in the seventh grade and just before this picture was taken, is that right? A. Yes.

Q. And that was sometime in 1954?

A. Yes.

Q. Can you tell me approximately the month in 1954? A. No, sir.

Q. Well was it more than six months before February of 1955? A. Oh, yes.

Q. More than six months? And on that particular occasion, you had used a Toni home wave kit, hadn't you? A. Yes.

Q. And when you used the Toni kit was it satisfactory, did you get a nice wave in your hair?

A. Yes, sir. [209]

Q. There was nothing, so far as you knew, that was wrong with the Toni kit, was there?

A. No.

Q. How long did the wave last that you got with the Toni kit? A. I couldn't tell you.

Q. Well in February of 1955, did you still have some wave in your hair or was it straight by that time? A. It was straight then.

(Testimony of Sandra Mae Nihill.)

Q. Now, when you went in to—was this Olig's drug store? A. Yes.

Q. Olig's Drug Store—you knew Mr. Olig, didn't you? A. Yes, sir.

Q. You bought things there before on several occasions, haven't you? A. Yes, sir.

Q. When you went in to Mr. Olig's drug store, did you go there for the specific purpose of buying a Cara Nome wave set?

A. Well we went to get a permanent of some kind.

Q. You went to get some kind of a cold wave set to do your hair at home, didn't you?

A. Yes, sir.

Q. And when you went there, did you talk to Mr. Olig about what particular kind of wave set that you should get? [210]

A. No, mom and I just talked it over.

Q. You and your mother talked, did you?

A. Yes.

Q. Now, when you went in to Olig's drug store on that date, did he have more than one kind of cold wave set for you to look at? A. Yes.

Q. He had several, didn't he? A. Yes.

Q. Do you know what different types you saw there? A. I couldn't tell you.

Q. Can you tell me how many different types, approximately, that you saw there that day and that you considered before you bought the Cara Nome set?

(Testimony of Sandra Mae Nihill.)

A. No, sir, I couldn't tell you, there were several of them there.

Q. Well, as many as five maybe? A. Yes.

Q. Do you remember the names of any of the other cold wave solutions which you considered?

A. No, sir.

Q. And when you went in to Mr. Olig's drug store on this date—by the way was this the same day that you used the Cara Nome set at home?

A. Yes, sir. [211]

Q. You bought it the same day, didn't you?

A. Yes, sir.

Q. That was February 5, 1955? A. Yes, sir.

Q. All right. Now, when you went in there on that particular day, February 5, 1955, had you ever heard of the Cara Nome wave before?

A. Well mom said it was okay.

Q. Your mother said it was okay?

A. Yes, she said she heard of it before.

Q. She heard of it before. Had you ever heard of it before? A. Well, I can't recall.

Q. You can't recall.

A. If I ever have, I don't remember.

Q. Isn't it true, Miss Nihill, that on that day that you went in to Olig's Drug Store, you first learned that there was such a wave preparation known as Cara Nome. Isn't that true?

A. I couldn't tell you for sure; I might have heard of it before, but I couldn't remember.

Q. Well if you heard of it before you don't remember it, do you? A. No.

(Testimony of Sandra Mae Nihill.)

Q. You don't remember ever having read about it in a newspaper or magazine article before February 5, 1955, do you? [212] A. Who, myself?

Q. Yes, ma'am.

A. I can't remember exactly.

Q. All right. And how long was it that you spent there in Olig's Drug Store before you finally decided to buy the Cara Nome wave set?

A. I couldn't tell you that either.

Q. All right. But at any rate you spent some time and you discussed the different types of wave set and your mother finally decided on this Cara Nome Set? A. Yes.

Q. To your knowledge, had anybody in your family ever used this Cara Nome wave set before that day? A. Not to my knowledge, no.

Q. All right. Now, sometime thereafter, you became aware of the fact that there was some sort of a guarantee—— (Addressing the Clerk) May I have the exhibits, the larger of the guarantees.

May I approach the witness, your Honor?

The Court: You may.

Q. This Exhibit 7, that you have identified, you say you got that in the drug store on the day that you bought this Cara Nome? A. Yes.

Q. Yes. Do you recall today that you got this particular guarantee on the day that you bought this wave set?

A. Well, there was a guarantee with it.

Q. Well, do you recall that there was a guarantee with it, ma'am, on the day that you bought it?

(Testimony of Sandra Mae Nihill.)

A. Well, the box——

Q. Do you recall receiving this guarantee here, which is Plaintiff's Exhibit No. 7, do you recall receiving this, or getting this, in Olig's Drug Store on the day that you bought the Cara Nome wave set? A. I don't remember——

Q. You don't remember getting this, do you?

A. No, not myself.

Q. When is it that you first remember having seen this particular guarantee which is Plaintiff's Exhibit No. 7?

A. Well when we went in to get the permanent, that was there, it was on display with the box.

Q. This particular guarantee that I have here in my hand which is Plaintiff's Exhibit No. 7?

A. Yes, sir.

Q. Do you remember distinctly that that was there on the day that you bought this wave set, is that right? A. Yes. [214]

Q. And do you recall picking it up and taking it with you when you bought the wave set?

A. I don't remember picking it up and taking it with me, but I remember seeing it there.

Q. You remember seeing it there?

A. Yes, sir.

Q. Well, insofar as this particular document here—this piece of paper that's Plaintiff's Exhibit No. 7, this physical thing that I hold in my hand, when is the first time that you recall having seen or touched this document?

A. Well that day in the store.

(Testimony of Sandra Mae Nihill.)

Q. Well do you recall having picked this up in the store and taking it with you?

A. Well myself, no, I didn't pick it up.

Q. You didn't pick it up?

A. I read it though.

Q. You read it in the store? A. Umhum.

Q. But sometime after February 5, 1955, you are aware of the fact that you saw this document that I have in my hand, aren't you? A. After?

Q. Well let me change the question. You told us Miss Nihill that you saw a document similar to this in the store on February 5, 1955. Is that correct? [215] A. Yes.

Q. Did you ever see this document again until you came into Court here yesterday?

A. Well, yes.

Q. Where did you see it the second time?

A. Well mother had it.

Q. She had it at home? A. Yes, sir.

Q. Well how long after you received this cold wave application to your hair was it that you saw this document the second time?

A. I couldn't answer because I don't know.

Q. Was it a year later?

A. I don't know.

Q. Could it have been maybe two years later?

A. I don't know.

Q. Where was it when you saw it for the second time?

A. Well it would be at home, you know.

Q. Do you recall it being at home, ma'am?

(Testimony of Sandra Mae Nihill.)

A. The last time I seen it mother had it.

Q. Well the last time you saw it your mother had it, let's get to that then. The last time you saw it, when your mother had it, where did you see it? A. I don't know.

Q. Well, was it in your home? [216]

A. Well, really, at the store is the last time I remember seeing it at all except when she had it there.

Mr. Bradish: May I have that answer, I didn't hear it. I hope you did, Miss Reporter.

(The reporter read the pending answer, as follows: "Well, really, at the store is the last time I remember seeing it at all, except when she had it there.")

Q. Is that correct, Miss Nihill?

A. Well mother had it there, and she said she was going to take it with her.

Q. Well, let me see if I get it straight then, on February 5, 1955, you were in the store with your mother and you saw this document in the store——

A. Yes.

Q. And you read it there? A. Yes.

Q. And so far as you know, of your own knowledge, that's the last time you ever saw this document until you came to Court here yesterday. Isn't that correct?

A. Well mother had it after that.

Q. I'm asking, Miss Nihill, if it isn't true that the last time you saw this document before you

(Testimony of Sandra Mae Nihill.)

came here to Court yesterday, was when it was in Olig's [217] Store on February 5, 1955? Isn't that right? A. The last time I seen it.

Q. Yes, ma'am?

A. Well mother seen it afterwards.

Q. Well I'm talking not what your mother saw because I assume that she will testify and we can talk to her later, but I only want to know what you recall? A. That's all I can recall.

Q. The last you recall you saw this document in Olig's Store on February 5, 1955, right?

A. Yes.

Q. All right. Now, this document here, which is Plaintiff's Exhibit No. 28, when did you first see that document?

A. This was inside the box.

Q. Well when did you first see it?

A. When we opened the box at the store and look at the contents, it was in there, and then at home.

Q. Did you see this particular document when you opened the box at the store? A. Yes.

Q. Well you did open the box at the store then, didn't you?

A. We opened it to see how many bobby pins were in there.

Q. You opened it to see how many bobby pins were in [218] there? A. Sure.

Q. All right. When you opened it to see how

(Testimony of Sandra Mae Nihill.)

many bobby pins were in it, did you see anything else in it?

A. Well, I couldn't tell you what was all in there.

Q. Pardon me?

A. I couldn't tell you what was all in it.

Q. You couldn't tell me what was in it?

A. No.

Q. You know that this was in it though?

A. Yes, we looked at the papers that was in it.

Q. You looked at the paper?

A. Yes, the directions.

Q. Do you recall, Miss Nihill, specifically seeing this little green piece of paper here, which is Plaintiff's Exhibit No. 28—do you distinctly recall at this time having seen this document in the box which you opened in Olig's Drug Store on February 5, 1955? A. Yes.

Q. You do. Did you read it at that time?

A. Yes, because—that's all.

Q. All right. You read it did you?

A. Yes.

Q. You were going to say "because" something, do you want to say anything more?

A. Because it was the same as the larger piece of paper. [219]

Q. It was the same as the larger piece of paper?

A. Well it was similar because they were both guarantees.

Q. They were both guarantees. And you read

(Testimony of Sandra Mae Nihill.)

and understood what that guarantee said, didn't you? A. Yes.

Q. You understood that that guarantee said that if the Cara Nome wave set wasn't better than any other that you used, you could bring it back and get double the purchase price that you paid for the set. Didn't you understand that?

A. Yes.

Q. Did you ever, ma'am, after you bought this set and applied the solution to your hair, did you ever go back to Olig's Drug Store and ask for double your money back with this guarantee?

A. I never.

Q. Now, I believe you testified that the instructions that were in this particular kit were read by all three of you ladies, your mother, Mrs. Briss, and yourself. Is that right? A. Yes, sir.

Q. And were they read before anything was done toward applying this cold wave to your hair?

A. Yes.

Q. And then I believe you also said that they were read aloud? [220] A. Yes.

Q. Who read them aloud? A. Mrs. Briss.

Q. Did she read them aloud to you and your mother? A. Yes.

Q. And did you read them yourself after you heard them read aloud? A. Yes.

Q. And you recall and understood what was contained in the directions, didn't you?

A. Yes, sir.

Q. Now, do I understand correctly that you

(Testimony of Sandra Mae Nihill.)

have no recollection at this time whether or not the pins were put in your hair before the solution was applied or after?

A. I couldn't tell you if they were or not.

Q. You do recall that your hair was shampooed before any of this Cara Nome solution was applied, don't you? A. Yes, sir.

Q. And how long was it before the Cara Nome solution was used that your hair was shampooed?

A. I think I shampooed it right before.

Q. Well in period of time, was it an hour or two hours or what?

A. Well, I couldn't tell you the exact time. [221]

Q. Can you give me any approximation?

A. About two hours or so.

Q. All right, and did you shampoo your hair yourself? A. Yes.

Q. And I believe you testified that you don't know what type of soap you used but it came out of a bottle? A. Yes.

Q. But you don't know the name of the soap. Is that right? A. I can't recall it.

Q. Do you know whether or not you had used that soap before on any occasion?

A. Probably had.

Q. Well do you know, ma'am, whether you used that particular type of soap at any time before this date? A. I couldn't tell you for sure.

Q. All right, thank you. And, insofar as the actual application of this solution to your hair is concerned, can you tell me the first thing that was

(Testimony of Sandra Mae Nihill.)

done to you, either by yourself, Mrs. Briss or your mother, after your hair was shampooed, in connection with this cold wave—what was the first thing that you recall that was done to your hair?

A. I couldn't tell you.

Q. You don't know? [222]

A. I can't recall it now.

Q. All right. Can you recall, from your reading the instructions or having the instructions read aloud to you, what was the first thing called for in the instructions to be done to your hair in the application of this solution?

A. No, sir, I can't recall.

Q. You don't know, do you? A. No, sir.

Q. And I believe you said, Miss Nihill, that at the time that this solution was poured over your head, you had a towel up over your eyes?

A. Yes.

Q. And you don't know whether that solution came out of the bottle or out of some other type of container, do you?

A. I assume it came out of the bottle.

Q. You assume it came out of the bottle?

A. That's the only other solution we had.

Q. Do you recall, ma'am, that in this Cara Nome set whether or not there was one or two or three types of solution to be used?

A. I couldn't tell you that.

Q. You don't know? A. No, sir. [223]

Q. As far as you can recall, there was only one solution used on your hair and that was what was

(Testimony of Sandra Mae Nihill.)

poured on your hair when you had the towels over your eyes, isn't that right?

A. Well, I don't know. I——

Q. As far as you can recall?

A. Well as far as I can recall.

Q. And when this solution was poured over your hair, and you had the towel over your eyes, as I recall your testimony, you are not sure whether or not you had the curlers or the pins, or whatever you ladies call these things, in your hair. Is that right? A. Yes.

Q. You don't know whether they were in or not? A. No, no then, I can't recall.

Q. What time of the day was it, please, that, approximately, that this treatment was given to your hair?

A. Well it was after supper some time.

Q. After supper, in the evening?

A. Yes, sir.

Q. And you've told us that you went to bed with these curlers in your hair. Is that right?

A. Yes.

Q. Well how long were you up after this process had been completed, before you went to bed?

A. I couldn't tell you that, I don't remember now. [224]

Q. A couple of hours? A. I don't remember.

Q. All right. You didn't notice any burning sensation to your scalp throughout the entire application of this treatment, did you? A. No.

(Testimony of Sandra Mae Nihill.)

Q. You noticed, when the bottle was opened, that it smelled a little bit funny? A. Yes.

Q. When you opened the bottle of the Toni application, did you notice that that smelled a little funny also? A. I can't remember that.

Q. You can't remember that. And you recall that there was some confusion concerning the timing of this procedure, but you are not sure whether or not Mrs. Briss said that she started to rinse it out fifteen minutes early. Is that correct?

A. Well the confusion was that she started to rinse it out early and mother corrected her and said we had to wait two more minutes, and so then we waited.

Q. I see. Do you know whether or not Mrs. Briss was watching the clock?

A. Yes, she was watching.

Q. She was watching the clock along with your mother, [225] is that right? A. Yes, sir.

Q. And when she wanted to rinse it out, your mother told her that she had two minutes to go?

A. Yes.

Q. And Mrs. Briss and your mother and you had all read the instructions before you started, hadn't you? A. Yes.

Q. Now, how long was it after this cold wave on February 5, 1955, that you first noticed that your hair was coming out?

A. Well about a week afterwards.

Q. And under what circumstances did you notice that?

(Testimony of Sandra Mae Nihill.)

A. Well when you combed it or something it would come out in the comb.

Q. It would come out in your comb?

A. Yes.

Q. Well, was there a lot of it or a small amount, or what?

A. I wouldn't know what you meant by "amount".

Q. Pardon?

A. What do you mean by the amount?

Q. Can you describe how much of it was—was it a big handful of it or just a small amount of hair?

A. Well, just when you put the comb through there would be some in the comb. [226]

Q. All right. Now, from the time that you got this cold wave until you first went to Dr. Martin on February 28, had you noticed any itching sensation or any irritation feeling whatsoever in your scalp or your eyebrows or your eye lashes?

A. I don't recall that.

Q. You don't recall any, do you. And, as far as you know, Miss Nihill, none of this solution which was poured out of the bottle over your head, none of that got into your eye lashes or your eyebrows, did it?

A. I couldn't tell you that.

Q. You don't know?

A. I couldn't tell you.

Q. At any rate, at that particular time, when

(Testimony of Sandra Mae Nihill.)

you had the towel over your eyes, did you have any burning sensation in your eyes at all?

A. Well, that's how come I kept the towel up there, to keep it from getting into my eyes.

Q. Well, all right. You kept the towel there to keep it from getting in your eyes. When you had the towel there, did you have any burning sensation or watering of your eyes at all?

A. Not that I can remember.

Q. All right. Now you have mentioned that—I believe—that as your hair started to come out, also all of [227] your eyebrows came out completely. Is that right? A. Yes.

Q. You had no eyebrows at all then as of June of 1955? A. I can't remember.

Q. Well did they seem to come out about the same time that your hair came out? A. Yes.

Q. And I believe you also testified that your eye lashes became very thin and sparse? A. Yes.

Q. And you only had a few of those left after June of 1955, is that right? A. Yes.

Q. Then you went to Dr. Martin on February 28, 1955, and he prescribed this medicine which has been indicated as being selsum, which you used on your hair. That's correct? A. Yes, sir.

Q. You are not sure how it was applied. Answer me this, if you can Miss Nihill, was it a cream or was it a paste or was it a liquid, what was the nature of this medicine that Dr. Martin prescribed for you to use? A. I couldn't tell you now.

(Testimony of Sandra Mae Nihill.)

Q. Did you apply it to your hair yourself at any time? A. No.

Q. Who applied it to your hair? [228]

A. My oldest sister applied it.

Q. Your oldest sister. A. Yes.

Q. And did this prescription that Dr. Martin gave you have any directions on it as to how this medicine was to be used? A. Yes, it did.

Q. Did you read the directions? A. Yes.

Q. What did they say as to how it was to be used?

A. Well, I couldn't tell you the exact directions.

Q. Well, can you tell me this, please, were you supposed to put this medicine in a bowl of water and bathe your head with it, or did you rub it into your hair, or into your scalp or in some manner can you tell me how it was used?

A. I think you just took it from the bottle and put it on your scalp, some way, but other than that I can't remember.

Q. You can't remember how your sister did it?

A. No, I can't remember.

Q. Can you remember from February 28, 1955, until July 6, 1955, can you remember how many times this selsum was applied to your head?

A. No, I can't remember. [229]

Q. Was it as many as five times, or——

Mr. Lanier: Your Honor. I'm going to object now as being repetitious. There's nothing new being added. We have been over this entire testimony with Mr. Packard, and the mere fact that there's

(Testimony of Sandra Mae Nihill.)

two defendants doesn't change the fact that this whole thing is repetition.

Mr. Bradish: Well, if I may be heard——

The Court: What did you say?

Mr. Bradish: If I may be heard, I'd like to say a few words. As I understand it, this is cross-examination, and I feel that I'm entitled to go into it rather completely since there has been a somewhat substantial claim made against my client in this matter.

The Court: I think you're entitled to go into your cross-examination with some degree of fullness. I think there is the usual, accepted, procedure whereby when two defendants have the same nature of case, involving the same type of facts, they should try to avoid making the cross-examination repetitive. I wish you would avoid that as much as you can. [230]

Mr. Bradish: I'll make every effort to do so, your Honor.

Q. (By Mr. Bradish, resuming): Isn't it a fact, Miss Nihill, that Dr. Martin is also somewhat connected with the School Board, where you attend school? A. I believe now he is.

Q. Was he at that time?

A. I couldn't tell you that.

Q. And during that period of time, between your first visit in February, and your second visit in June, did you ever have occasion to see Dr. Martin, either socially or otherwise, in your town?

(Testimony of Sandra Mae Nihill.)

A. Well, I suppose I see him on the street, going to and from school.

Q. Did you ever at that time discuss the condition of your hair with him? A. No.

Q. And on your second visit to Dr. Martin, he didn't make any prescription to you, he just told you to go see Dr. Melton? A. Yes.

Q. And you saw Dr. Melton, I believe, approximately four times? A. Approximately, yes.

Q. And he prescribed pills for you, didn't he?

A. Umhum. [231]

Q. When was the last time, Miss Nihill, that you have seen—I'm excluding now Dr. Levitt that you saw the other day, and Dr. Starr, that you saw at the request of Mr. Packard—excluding Dr. Levitt and Dr. Starr, when is the last time that you have seen any doctor for either treatment or examination of your hair condition?

A. Well, we had a basketball tournament——

Q. Did Dr. Martin examine your hair at that time? A. No, sir, not at that time.

Q. All right. And that was in February of this year, '58, wasn't it? A. Approximately.

Q. And then you had an examination by Dr. Martin for the same purpose in approximately February of 1957, didn't you? A. Oh, yes.

Q. All right. Between those two dates, February of '57 and the present time, other than Dr. Levitt and Dr. Starr, which you saw here in Los Angeles, have you seen any doctor for either examination or treatment of your hair?

(Testimony of Sandra Mae Nihill.)

A. I don't remember.

Q. Well, let me ask you this, since February 5, 1955, have you seen any doctor at all for examination or treatment, other than Dr. Martin or Dr. Melton? [232] A. I seen Dr. Michelson.

Q. You saw Dr. Michelson and he examined you at the request of Mr. Packard, did he not?

A. Yes.

Q. That was in Minnesota? A. Yes.

Q. All right. Excluding Dr. Michelson, for treatment or examination from the date of this cold wave in February of '55 up to the present time, have you seen any other doctors, except Dr. Melton or Dr. Martin, for treatment to your hair?

A. Well, Dr. Michelson.

Q. Did you see Dr. Michelson more than once?

A. I just think it was the one time.

Q. Just once. Excluding Dr. Michelson, any other doctors at all? A. I believe not.

Q. When you went in to Olig's Drug Store on this date, did you read the package that you bought, later? A. Oh, yes, we looked at it.

Q. You looked at the outside? A. Yes.

Q. Did you see anything written on the outside of the package that convinced you that that was the type that you should buy? [233]

A. Well on the outside of it was something about being quicker and safer or something.

Q. Quicker and safer?

A. Well, something——

(Testimony of Sandra Mae Nihill.)

Q. Do you recall seeing that on the outside of the package?

A. Well, somewhere—I remember those words.

Q. Well, did reading that, if you saw it on the outside of the package, in any way influence you to decide to buy that particular product, other than one of the others? A. No, sir, I——

Q. Didn't have anything to do with it, did it?

A. No, sir.

Mr. Bradish: That's all.

The Court: Any further direct, re-direct?

Mr. Lanier: One or two questions, your Honor.

Redirect Examination

Q. (By Mr. Lanier): Now, Sandra, there have been one or two questions asked you in relation to your being examined at the request of the defendant, by a Dr. Starr, here in [234] Los Angeles. That examination was made yesterday noon. Is that correct? A. Yes.

Q. Do you recall what time you went to Dr. Starr's office?

A. We left here about twelve-thirty or so, and we got there about one o'clock.

Q. Now, I'm not counting your waiting time in the office, Sandra, but the actual examining time of Dr. Starr, how long were you with Dr. Starr in the examination?

A. Well, approximately only about twenty minutes or so.

Q. With Dr. Starr himself? A. Yes.

(Testimony of Sandra Mae Nihill.)

Q. All right. You were also asked, Sandra, whether or not any one in your home, of your family, that you knew of, ever used Cara Nome before, and you stated "not to your knowledge". Is that correct? A. Yes.

Q. Has anyone ever used it since? A. No.

Mr. Packard: I object.

Mr. Lanier: That's all, your Honor. [235]

The Court: Well it may stand.

Recross Examination

Q. (By Mr. Packard): Sandra, in connection with the reading of these instructions, when were these instructions read during the time you were being given this cold wave? When I say that, were the instructions read before your shampoo or after your shampoo, or were they read before your hair was pinned up, after it was pinned up. Do you recall that?

Mr. Lanier: May it please the Court, objected to, it's beyond the scope of the re-direct examination.

The Court: Overruled.

A. Well we read it before and after, both.

Q. Now, you, I believe, stated in response to a question Mr. Bradish asked you—the gentleman over here—that the only solution you saw came out of a bottle. I believe that we have here a bottle which has been marked Plaintiff's No. 5. You have seen that bottle, is that correct? [236]

A. Yes.

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: May the record show, your Honor, so that I won't be interrupting anymore, that I have a standing objection to every question asked which is beyond the scope of the redirect examination?

The Court: You may have your objection noted and have an exception to each ruling of the Court.

Q. (By Mr. Packard, resuming): Now, you observed that bottle I just showed you, Sandra, is that correct? A. Yes.

Q. Now, did you observe what was done with the bottle after you were given your cold wave?

A. You mean directly afterwards?

Q. Yes? A. No, I can't remember.

Q. When was the next time you saw that bottle?

A. Well, mother looked it up again after my hair started falling out.

Q. And when was it that your mother looked up the bottle after you had this difficulty with your hair? A. I couldn't tell you exactly.

Q. A week, two weeks, a month?

A. It was just a couple of weeks afterwards.

Q. A couple of weeks afterwards your mother looked around for the bottle? Is that correct?

A. That's as close as I can remember.

Mr. Packard: That's all the questions.

Mr. Bradish: Nothing further.

The Court: Stand aside.

(Witness excused.)

Mr. Lanier: At this time, may it please the Court, the plaintiff would call Mr. Grace Spedding.

The Court: Will that be a long witness?

Mr. Lanier: I believe not, your Honor. At least she won't be on my part.

The Court: Very well.

Thereupon,

GRACE SPEDDING

called as a witness on behalf of the plaintiff, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

The Clerk: What is your name?

The Witness: Grace Spedding.

The Clerk: Thank you.

Direct Examination

Q. (By Mr. Lanier): Your name is Mrs. Grace Spedding? A. Yes.

Q. And where do you live Mrs. Spedding?

A. I live in Woodland Hills.

Q. That is California? A. Yes.

Q. I presume everyone here knows those names, I don't. What is your business, Mrs. Spedding?

A. I'm in the hair business—wig maker.

Q. And do you have a business establishment?

A. Yes, I do.

Q. And where is that located?

A. We're at 6671 Sunset Boulevard, Hollywood.

Q. And, Mrs. Spedding, would you tell the jury how long you have been in the wig making and transformation making business?

A. Well I was employed by Max Factor for thirty years, and [239] I've been in business for myself about fifteen.

(Testimony of Grace Spedding.)

Q. So that you have been in that business exclusively for forty-five years? A. Yes.

Q. Thirty of it with Max Factor and fifteen with your own establishment? A. That's right.

Q. Is your establishment, as such, and in its field, Mrs. Spedding, is it a large establishment or a small establishment?

Mr. Bradish: Well, wait a minute. I object to that as calling for her conclusion. Every person who is in business thinks they have a large establishment——

The Court: Well maybe she doesn't; we'll find out.

A. Well I'm next in size to Max Factor.

Q. That is in Los Angeles? A. Yes.

Mr. Bradish: May the record show that I move to strike that as this lady's conclusion. We have no evidence here as to how large Max Factor is, and whether there is somebody larger; I don't think it's particularly material, but I would like the record to reflect that. [240]

The Court: Motion denied. Proceed.

Q. (Mr. Lanier, resuming): Mrs. Spedding, did you have occasion, Monday of this week, to examine and to measure and fit Sandra Nihill?

A. I did.

Q. And have you made those measurements and fittings? A. Yes, I have.

Q. For what purpose? A. To make a wig.

Q. Now, would you tell the jury, Mrs. Spedding, what the approximate cost of a wig for Sandra is?

(Testimony of Grace Spedding.)

A. Well, I priced it at $275.

Q. Now, Mrs. Spedding, so that the jury might know, is it possible, can you make, within your establishment, and your regular prices, can you make her a wig cheaper than that?

A. Yes, I can.

Q. About how cheap could it be made?

A. Well, I'd say around $200.

Q. That would be about the bottom?

A. Yes.

Q. Now, would you explain to the jury, Mrs. Spedding, the normal care of a wig?

A. Well, they have to come in for cleaning and dressing about every week and that is dipped in solvent, and [241] then it's put on blocks and stretched to the proper size of the head again, and water waved, pincurled and dried, then it's combed out and delivered to the customer again.

Q. You say that is about a weekly operation?

A. Yes.

Q. And what is the normal charge of that operation? A. Five dollars.

Q. Can this be done anywhere in the country, Mrs. Spedding?

A. Well it has to be done by someone that understands working with hair—artificial hair.

Q. Do you know of any such establishment in the State of North Dakota?

A. No, I do not.

Q. Do you know of any such establishment in the State of South Dakota?

(Testimony of Grace Spedding.)

A. No, I do not.

Q. Do you know of any such establishment in the State of Minnesota? A. No, I do not.

Q. With your customers, Mrs. Spedding, do you have any large number of "out-of-city", "out-of-State" customers? A. Yes, we do. [242]

Q. Are their transformations mailed back to you for such treatment as you have described?

A. Yes.

Q. Now, that brings us to the next point, Mrs. Spedding. Is it under proper care, is it possible to get by with one transformation?

A. No, you really need two. You must have two.

Q. You must have two? A. Yes.

Q. Do you recommend anymore?

A. Well, it's very convenient to have three, or more. I have some customers that have as many as ten.

Q. Will you explain to the jury why it is better to have three?

A. If you have three, and you have to ship them, you wear one and you generally have one in the mail and you have one in reserve. You always need one in reserve. If something happens to your hair piece, if you're caught out in the rain or if you are going somewhere and you need a new hair set, you can't rush to a beauty shop and get it, you have to have a fresh hair piece to put on.

Q. Then, if not three for convenience, two are necessary? A. Yes, absolutely.

Q. Now, Mrs. Spedding, would you tell the jury

(Testimony of Grace Spedding.)

what the [243] normal life of one transformation, such as you have described, and at such cost as you have described, would you tell them what the life of a transformation is?

A. Well, of course, that depends on the care that you give it, but approximately eight months or a year.

Q. Presuming good care? A. Yes.

Q. Then you would state eight months to a year? A. Yes.

Q. And at that time the transformation then must be replaced? A. That's true.

Q. New wigs made? A. That's right.

Q. And when the new wigs are made, are they at the same cost approximately, as you have already given me? A. Yes.

Mr. Lanier: Your witness.

Mr. Packard: I have no questions.

Cross Examination

Q. (By Mr. Bradish): Mrs. Spedding, did you make this transformation that this lady is wearing now? A. No, I did not. [244]

Q. And you have taken an order, I suppose, to make up one for her? A. Yes.

Q. In your business, Mrs. Spedding, you are not concerned with determining whether or not your customers will ever get their hair back, are you?

A. Well I'm sure if I could make hair grow, I'd be very happy to do that.

(Testimony of Grace Spedding.)

Q. Yes, ma'am, but when you took somebody for one of these transformations, you don't determine whether or not the doctor has indicated that they can't have any more hair, do you?

A. No, I don't.

Q. In other words, you fit a transformation to a head, and as long as the customer comes to you for new ones, you send them some new ones, don't you? A. Oh, naturally, we're in business.

Q. That's your business, isn't it? A. Yes.

Mr. Bradish: That's all.

Mr. Lanier: No further questions, Mrs. Spedding. Thank you very kindly.

(Witness excused.) [245]

The Court: I think we'll be in recess for ten minutes. Try to get back to the jury box in ten minutes please.

(Thereupon, a ten minute recess was taken, and thereafter the following proceedings were had in open court:)

The Court: Proceed.

Mr. Lanier: I wonder if the Clerk would get me the deposition of Mr. Charles A. Schmid.

Mr. Packard: Charles who?

Mr. Lanier: Schmid.

Mr. Packard: I never heard of him.

Mr. Lanier: You were represented at the deposition, counsel. If you will look at the end of your Dr. Melton deposition I think you will find it.

(The Clerk furnished the deposition of Mr. Charles A. Schmid.)

Mr. Lanier: We have plenty of copies of this, your Honor, so if the Court would want to follow. Could I get permission [246] of the Court, your Honor, to have associate counsel take the witness stand and answer the questions?

The Court: Very well.

Thereupon,

DEPOSITION OF CHARLES A. SCHMID

witness for the plaintiff, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, before the Court and Jury, as follows:

Mr. Lanier: So that the jury might know, I am going to read the questions as the interrogator and Mr. Rourke will answer as the witness who gave this deposition.

May we dispense with the stipulations at the start of it, counsel?

Mr. Packard): Yes. I'll stipulate insofar as all the depositions are concerned counsel, that the proper formalities have been met, proper foundations, and so forth on all the depositions.

Mr. Lanier: It is so stipulated.

The Court: Let the record so show.

Mr. Lanier: Charles A. Schmid, being first duly sworn to testify [247] the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Q. (By Mr. Lanier): Would you state your name? A. Charles A. Schmid.

Q. Where do you live?

A. 318 23rd Avenue North, Fargo.

(Deposition of Charles A. Schmid.)

Q. What is your occupation?

A. I am a photographer.

Q. How long have you been in the photography business? A. About eight years.

Q. How long have you been in that business in Fargo? A. About four and a half years.

Q. Were you in that business in Fargo in about January of 1955? A. I was.

Q. Did you or not have occasion on or about January 20th of 1955, of taking some pictures of a girl named Sandra Mae Nihill of Kensal, North Dakota? A. Yes.

Mr. Packard: Counsel, if I may interrupt you just a moment. I will stipulate the reporter need not take down all the depositions unless something is objected to, or there is some objection raised.

Mr. Lanier: I will so stipulate, counsel.

Mr. Packard: They will be on file.

Q. (By Mr. Lanier, resuming): Was that picture taken as one of a particular group or class?

A. She was a student at the Kensal High School and she was one of the students there.

Q. Your firm of photographers had contracted to take pictures of that particular high school group? A. That is right.

Q. Mr. Schmid, I show you Plaintiff's Exhibit C. Would you tell me whether or not if that is a finished picture of Sandra Mae Nihill which you took on or about January 20, 1955?

A. Yes, it is the original print, one of the original prints.

(Deposition of Charles A. Schmid.)

Q. Do you still have in your possession the negative of that print? A. That I don't know.

(Plaintiff's Exhibit D marked—photograph.)

Q. Mr. Schmid, I show you plaintiff's Exhibit D. Would you tell me what that exhibit is?

A. It is an enlarged copy of Exhibit C.

Q. Did you and your firm make that enlargement? [249] A. I made it myself.

Mr. Lanier: At this time, may the record show that I offer into evidence Plaintiff's Exhibits C and D.

For the purpose of clarification, your Honor, I believe that they had best be remarked.

The Court: I think so, yes.

Mr. Lanier: In the order that the Clerk has the others.

The Clerk: Plaintiff's Exhibit No. 30 marked for identification. And Plaintiff's No. 31 marked for identification.

(Thereupon, the photographs previously marked Plaintiff's Exhibits C and D respectively, were remarked for identification by the Clerk, as Plaintiff's Exhibits 30 and 31 respectively.)

Mr. Lanier: At this time, may it please the Court, I offer into evidence Plaintiff's Exhibits 30 and 31.

The Court: Which one is 31?

Mr. Rourke: The enlargement.

The Court: The same as the small? [250]

Mr. Packard: No objection.

(Deposition of Charles A. Schmid.)

The Court: Admitted.

(Thereupon, Plaintiff's Exhibits Nos. 30 and 31, heretofore marked for identification, were received in evidence and made a part of this record.)

Mr. Lanier: That is true of both counsel?

Mr. Bradish: Yes.

Mr. Lanier: May I have permission to pass this photograph to the jury, your Honor?

The Court: You may.

(Thereupon, the photograph was passed to the jury for their examination.)

Q. (Mr. Lanier, resuming): Mr. Schmid, I show you plaintiff's exhibits A and B. Will you tell me whether or not you took those pictures?

A. I did.

Q. Will you tell me approximately upon what date you took those pictures?

A. May 26, 1956. [251]

Q. And appearing on the back of these exhibits A and B are certain seals, "From Scherling's, Inc." Is Scherling's, Inc., your company, the company that you work with?

A. Scherling's, Incorporated, yes.

Q. Is that your seal on the back?

A. That is our mailing label.

Q. Did you cause these labels to be placed on the back of the photographs?

A. I typed it up on the typewriter and I glued them on myself.

Mr. Lanier: I offer in evidence Plaintiff's Ex-

(Deposition of Charles A. Schmid.)

hibits A and B. And, likewise, your Honor, I believe we had best re-mark these to conform with the——

The Court: Very well. Re-mark them.

The Clerk: Plaintiff's Exhibit 32——

The Court: Have you gentlemen seen those?

Mr. Packard: Yes, I have copies, your Honor.

The Court: Any objection? [252]

Mr. Packard: No objection.

The Court: Mr. Bradish?

Mr. Bradish: No objection.

The Court: Admitted.

The Clerk: ——and 33 admitted in evidence.

The Court: Offered and admitted in evidence.

(Thereupon, Plaintiff's Exhibits previously marked A and B, were re-marked Plaintiff's Exhibits Nos. 32 and 33, received in evidence and made a part of this record.)

The Court: Pardon me. Did the witness state the date of this——

Mr. Packard: May 26, 1956.

(Thereupon, said Exhibits 32 and 33 were passed to the jury.)

Mr. Lanier: Does counsel care to read the cross?

Mr. Packard: I don't care to ask any questions on cross examination. We will waive the cross examination, your Honor. [253]

The Court: Cross examination waived.

Mr. Lanier: At this time, would the Clerk please get me the original deposition of Mrs. Adaline Jorgenson?

(The Clerk furnished said deposition to counsel.)

Mr. Lanier: In this case, your Honor, there are insufficient copies and the witness, I'm afraid, will have to read from the original.

The Court: What's the name of the witness?

Mr. Lanier: Mrs. Adaline (spelling) A-d-a-l-i-n-e Jorgenson. I might add here, your Honor, that Mrs. Jorgenson is the lady, throughout this trial, who has been referred to as Mrs. Briss.

Thereupon,

DEPOSITION OF MRS. ADALINE JORGENSON

was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, as follows:

Mr. Lanier: Mrs. Adaline Jorgenson, a witness called at the request of the defendants, being first duly sworn to testify to the truth, the whole truth, so help her God, thereupon testified as follows:

Mr. Lanier: Now, counsel, I presume that you will possibly want [254] to read that yourself?

Mr. Packard: What are you talking about, counsel?

Mr. Lanier: This is cross examination.

Mr. Packard: No, you can go ahead and read that.

Mr. Lanier: All right (Reading:)

By Mr. Jungroth: (For the defendants)

Q. Would you state your name, please?

A. Mrs. Adaline Jorgenson.

Q. And Mrs. Jorgenson, I don't wish to pry into

(Deposition of Mrs. Adaline Jorgenson.)

your affairs, or anything, but you are the same person who gave a statement at 10:00 o'clock in the morning on February 23, 1956?

A. That's right.

Q. And I believe at that time you were Mrs. William Briss, is that true? A. Yes.

Q. Now, Mrs. Jorgenson, I understand that you were one of the persons who assisted in giving a home permanent to Sandra Mae Nihill sometime in February of 1953? A. I was. [255]

Q. Do you remember when that was?

A. February the 5th of 1955.

Q. And how do you remember the date so specifically?

A. Well, it was before the basketball tournament, the Saturday before the basketball tournaments started because she wanted her permanent for the basketball tournament.

Q. And who was present at the time that you——

A. Well, Mrs. Nihill, and all the other children at home, besides myself and my husband.

Q. Who were all the other children you mentioned?

A. Well, there was the boys, Pat and Tommy, and then my boys. It was in the evening.

Q. Who was actually in the room at the time you were giving the permanent?

A. Well, I believe it was the three of us, Mrs. Nihill, and I, and Sandra.

(Deposition of Mrs. Adaline Jorgenson.)

Q. And who was actually involved in the giving of the permanent?

A. I put the pin curls in.

Q. And you, of course, are not a licensed beauty operator? A. No.

Q. Or a hairdresser? A. No.

Q. Or a cosmotologist? A. No. [236]

Q. How did you go about putting the pin curls in?

A. Well, I had her shampoo her hair first, like in the directions, and then rolled it up in pin curls and poured the solution on.

Q. What kind of a permanent wave did you have? A. We had a Cara Nome.

Q. And were there instructions in the box?

A. Yes.

Q. Now, I believe that you stated that you had her shampoo her hair, let it partly dry, and put it in pin curls? A. Yes.

Q. What was the next step that you took?

A. Well, to put the solution on.

Q. How did you put the solution on?

A. With a piece of cotton.

Q. Where was the solution at the time?

A. It was in a glass dish on the table.

Q. Was the solution in the glass dish straight, I mean, did you just pour solution out of the bottle?

A. I was supposed to take half of it first and then cork the rest up, and after I got the pin curls up, put the rest of it on.

(Deposition of Mrs. Adaline Jorgenson.)

Q. Now let me get this. You put the hair up in pin curls first? [257]

A. I put, soaked it with the solution first, and then I put it in pin curls. After I had it all up in pin curls, then I put the rest of the solution on, what was left.

Q. How long did you leave it in after, let's see, the first time that you soaked it in the solution?

A. Before I neutralized it you mean?

Q. Yes.

A. Well, I don't remember just the exact time, but I went by the directions. We had read those over carefully first.

Q. Where was Sandra Nihill sitting at this time?

A. At a chair by the dining room table.

Q. Where was her mother?

A. Sitting right alongside the table.

Q. And where was the bowl that you mentioned?

A. On the table.

Q. And where was the permanent, the solution?

A. That was sitting in the bottle on the table, what I didn't have in the dish.

Q. Were you watching television or anything while you gave the permanent?

A. No, they didn't have television.

Q. Whose home were you in at that time?

A. Nihill's.

Q. And where was that? [258]

A. That was three miles and a half west of where I lived.

Q. And as you gave this permanent what did

(Deposition of Mrs. Adaline Jorgenson.)

you do when you finished then with it? You put the solution on, you rolled it up, you put more solution on. Then what did you do?

A. You are supposed to wait a certain length of time.

Q. And you waited that length of time, did you?

A. Yes.

Q. And then what did you do?

A. Then you are supposed to neutralize it. Well, I waited and when it was time to neutralize, I didn't remember the exact time to neutralize. Well, I started to neutralize a few minutes before I was supposed, and I happened to think about it and it was ahead of time. I didn't leave it too long; I started rinsing it out before the time was up.

Q. And you are sure that only one home permanent was used, there weren't parts of any two mixed?

A. Oh, no, the seal was never broken on that bottle until I broke it.

Q. And at the time are you sure that you didn't make any other mistakes in following the directions?

A. No, I always read them over carefully first.

Q. Now, I believe the directions state that the permanent is to be kept off the forehead, is that right? [259]

A. Yes, it is supposed to be.

Q. And what precautions did you take to see that it was kept off the forehead?

A. Well, whenever it dripped down we had her

(Deposition of Mrs. Adaline Jorgenson.)

take a towel and dry it. Naturally some is bound to drip down.

Q. You did have a towel on her forehead though when putting——

A. So if it started to run we would wipe it right off.

Q. And you kept it off of her eyebrows that way? A. Well, we tried to.

Q. Well, didn't you?

A. I don't know if some got down there or not.

Q. But you did follow the directions?

A. Yes, we did follow the directions.

Q. And what part did Mrs. Nihill take in the——

A. Well, she was helping us time the permanent.

Q. And by helping you time how did she go about it?

A. Well, she was watching the clock on the wall, but then she happened to be doing something there once when I thought the time was up, and it wasn't, when I started rinsing it out.

Q. And she wasn't watching the clock at that time? A. No.

Q. Now, did you keep a towel on her forehead all the [260] time you were soaking the solution into the hair? A. Yes.

Q. So that the towel on the forehead then would keep any of the solution from the forehead?

A. Well, it would keep the biggest part of it; some of it might have leaked down under, might have leaked. That was the general idea, to keep the

(Deposition of Mrs. Adaline Jorgenson.)
solution from getting in her eyebrows and in her eyes.

Q. Sandra Nihill never complained about any solution being in her eyes?

A. Well, not to my knowledge.

Q. She never mentioned it to you that you recall? A. No.

Q. And you did your best, then, to keep the solution from her forehead? A. Yes, I did.

Q. And you used a towel to soak it up with when you put the dobs on the hair?

A. To wipe it off her forehead if some did leak down there.

Q. How much of the solution was used then?

A. All of it.

Q. And then when the, you said the time was up, I believe, and you put the neutralizer on, then what did you do? [261]

A. Well, I told her to put a towel on her face and put her head under the faucet on the sink, and they had a spray on there, and I started spraying the solution out of her hair after the neutralizer was out of it.

Q. And how long did you do this?

A. Well, until I thought it was, the solution was out.

Q. And what did you do then?

A. Then we took and combed her hair out after it dried and put it up in pin curls again.

Q. Oh, the pin curls weren't left in all the time?

A. Just until her hair dried.

(Deposition of Mrs. Adaline Jorgenson.)

Q. And it dried that night, did it?

A. Yes, it was dried that night before she went to bed, and we reset it with just water.

Q. Did Mrs. Nihill take any part in putting the solution on the hair? A. No.

Q. Did Sandra take any part in putting it on the hair? A. No.

Q. And did anyone else take part in putting it on the hair besides yourself? A. No.

Q. And have you ever given home permanents before?

A. Oh, yes, I have given a lot of them.

Mr. Jungroth: I believe that is all. [262]

Redirect Examination

Q. (By Mr. Lanier): Counsel has referred to a previous statement taken by him, Mrs. Jorgenson, at a time when your name was Mrs. Briss?

A. Yes.

Q. And your name now is Mrs. Erickson?

A. Jorgenson.

Q. Jorgenson, excuse me. Would you tell me when Mr. Briss passed away?

A. November 7th, 1956.

Q. And you have since recently remarried?

A. Yes.

Q. To a Mr. Jorgenson? A. Yes.

Q. At Kensal, North Dakota? A. Yes.

Q. And did you live at Kensal, North Dakota prior to Mr. Briss'——

A. We lived on a farm northeast of Kensal.

(Deposition of Mrs. Adaline Jorgenson.)

Q. In other words, that has been your general community area for a long time?

A. For 17 years.

Q. And now you have also testified that you have given many home permanents? [263]

A. I have.

Q. That would cover, I presume, a variety of different brands of home permanents?

A. That's right.

Q. Do they or not all come with instructions for use? A. They do.

Q. Do those instructions sometimes vary from one to the other? A. Oh, yes.

Q. As a result, then, do you or not make it a habit to carefully read those instructions?

A. I do. I read every set of instructions with each permanent carefully.

Q. Do you or not follow the particular set of instructions given for each particular home wave?

A. I do.

Q. Did you do that in that particular case of the application of the Rexall Cara Nome?

A. Yes.

Q. Did you follow it carefully and meticulously?

A. Yes, I did.

Q. What particular reason is it that you have given a great number of these home waves?

Mr. Packard: I waive the objection. [264]

A. Well, I have a lot of friends and they want home permanents, and they knew I had been putting them in, so I do it for a favor for them.

(Deposition of Mrs. Adaline Jorgenson.)

Q. You have never done that on a charge basis?

A. Oh, no.

Q. How big is Kensal, by the way?

A. I haven't the slightest idea. It isn't very large.

Q. Can you give me a rough approximation?

A. About 350. I haven't the slightest idea.

Q. Would 350 people sound right to you?

A. Well, about that.

Q. And then there is also a rather populated farm area around Kensal? A. There is.

Q. And I presume that that is a town that is a rather close-knit, neighborly group?

A. They are.

Q. And it's among your friends and neighbors that you have given these permanents?

A. Yes.

Q. So that do you feel yourself qualified and very able by experience in giving these home waves?

Mr. Packard: I object. That calls for her conclusion. Self-serving. [265]

The Court: She may answer.

A. I figure if they want me to put them in, I will.

Q. Do you feel yourself qualified to?

A. Well, I think I am.

Q. All right. Now, Mrs. Jorgenson, in the application and use of these various home waves that you have given, have you ever had any result such as you saw in the use of this Rexall Cara Nome permanent? A. Never.

(Deposition of Mrs. Adaline Jorgenson.)

Q. In your experience in the giving of these various waves, have you ever had, aside from hair or scalp damage, have you ever had what you would call a poor result?

A. Well, there is some that doesn't turn out as good as the Toni. It all depends on the different kind of permanents too.

Q. Are you referring there to the type of the wave?

A. Yes. That has a lot to do with it.

Q. Have you ever seen any result in your own personal experience where the hair has been damaged?

A. No, I have never seen any damage done to hair before, except in this case.

Q. Have you ever, in your experience in giving the home [266] waves, seen any damage other than this case to the scalp or skin?

Mr. Packard: Just a moment. I object to that question on the ground that it calls for medical testimony, and calls for a conclusion of this witness, and is speculative. No proper foundation.

The Court: Read the question again, Mr. Lanier.

Mr. Lanier: That particular question, your Honor, was not answered in the deposition anyway, so it might just as well be withdrawn.

The Court: Withdrawn and the jury will disregard it.

Q. Now, from the time that you first opened the bottle of the solution of the Rexall Cara Nome product at the time you were giving the wave to

(Deposition of Mrs. Adaline Jorgenson.)

Sandra Nihill, did you notice anything unusual about the solution? A. Yes, I did.

Q. Would you state what that was?

A. It had an awfully strong odor.

Q. Was that odor visibly to you stronger than others? A. Oh, yes.

Q. Now, in the use of the solution, the permanent wave [267] solution, did you notice anything unusual about its sensation and feel upon your own hands? A. Yes, I did.

Q. And would you tell me what that was?

A. That it smarted my eyes, made my eyes burn, and it made my hands burn.

Q. Have you ever had that same sensation from any other permanent wave solution, home waves, that you have used?

A. No, I never had that same experience.

Q. Now you have testified, Mrs. Jorgenson, that you also used a towel? A. Yes.

Q. And had Sandra holding a towel. I believe you yourself never held or used the towel, did you?

A. No. Well, just when it started running down her face when I was putting the pin curl in.

Q. That towel was being held by Sandra?

A. Most of the time.

Q. Now, I believe that the directions with the box stated that you were to use one-half of the wave solution first being dobbed on each individual pin curl. Is that correct? A. That is correct.

Q. And after that you were to throw away the dish in [268] which you have put one-half of the

(Deposition of Mrs. Adaline Jorgenson.)

solution, that is, throw the solution out of the dish—— A. What you didn't use.

Q. And put in the other half remaining in the bottle in the dish, is that correct?

A. That's correct.

Q. And then I believe the directions went on further to state that you were to take that bowl again consisting of one-half of the bottle, and pour it all over the head, is that correct?

A. I believe that is right.

Q. Did you do that? A. Yes.

Q. And I believe the directions go further and state that you should use another bowl to catch the solution while you were pouring it, while it ran down the head, is that correct? A. I believe.

Q. And was that done? A. Yes.

Q. Now, regardless—scratch.

Where were you at the time you were pouring the solution over her head?

A. Over the kitchen sink. [269]

Q. Was she sitting in what position, with her head over the sink?

A. She was standing and bending with her head down in the sink.

Q. And that would be face down in the sink?

A. Yes.

Q. So that the solution went over her head and ran down the front part of her head, is that correct?

A. Yes.

Q. And this solution, of course, all didn't stay in the hair? A. No, it didn't.

(Deposition of Mrs. Adaline Jorgenson.)

Q. It had to run down. Now, she was sitting there with a towel, was she?

A. Yes, she had a towel.

Q. And would it be possible for that towel, for that solution to run over her head without running down her forehead?

Mr. Packard: Well I object. That calls for a conclusion. Speculation.

The Court: Sustained.

Q. Did the solution run down her forehead?

Mr. Packard: I move to strike the answer on the ground that it's not responsive. [270]

The Court: I don't know what the answer is.

Mr. Packard: Well, I believe the answer is not responsive. I can show you.

(Counsel shows the answer in the deposition to the Court.)

Mr. Lanier: I'm inclined to agree with counsel, your Honor, that it is not responsive.

The Court: Objection sustained.

Q. After you were through pouring the solution, was it or not necessary to take the towel and dab off the solution from her forehead and eyebrows?

A. Yes, it was.

Q. And you definitely did remove the solution from her forehead and eyebrows? A. Yes.

Q. So then that the solution in some form or another did get into the eyebrows? A. Yes.

Mr. Lanier: I wonder if you will please mark this Plaintiff's Exhibit "E." [271]

(Deposition of Mrs. Adaline Jorgenson.)

Mr. Lanier: And "FF" at that time was also marked.

Q. Now, Mrs. Jorgenson, I show you a piece of paper which has been marked as Plaintiff's Exhibit "E." I will ask you to look that over carefully and tell me whether or not that is substantially the same instructions that you read and followed in your application of the Cara Nome Home Permanent Wave?

Mr. Packard: Now, I object to the answer upon the ground that it calls for a conclusion on the part of this witness as to whether she followed the instructions. That's a question for the jury to determine. They have heard the testimony as to the procedure that was followed; they have in evidence the instructions and they can compare it with the testimony. For her to testify that she followed the instructions would be her conclusion.

The Court: There may be some merit to the objection, but I think I'll overrule it, and let the answer be read.

A. Yes, I believe they are the same ones.

Q. All right. Now I show you Plaintiff's Exhibit "F" and ask you whether or not this is the same type of package and container in which the Cara Nome pin curl which you used on February 5th on Sandra Nihill—— [272]

A. That is the same.

Mr. Lanier: And may the record show that Exhibit "F" is such a kit as has been testified to by the witness, and that Exhibit "E" is the directions

(Deposition of Mrs. Adaline Jorgenson.)
from that kit which are being replaced in Exhibit "F" at the time of the taking of this deposition.

Q. Mrs. Jorgenson, how long have you known Sandra Nihill?

A. Oh, for the last 17 years.

Q. Not Sandra——

A. Not Sandra, but I have known Nihills that long. I have known Sandra ever since she was born.

Q. Ever since she was born. All right. Now, have you ever had occasion to give Sandra Nihill herself a home permanent wave other than this?

A. Yes.

Q. Was that before or after the application of Cara Nome? A. That was before.

Q. Do you recall for sure what kind of a wave you gave her?

A. I believe it was a Toni end curl.

Q. And could you state as to whether or not—scratch. Did you follow the directions in that particular home wave? A. Yes. [273]

Q. And can you tell me what results were obtained? A. It turned out nice.

Q. The hair was exactly as prior to giving it?

A. Yes.

Q. Then this would be the second wave, the Cara Nome wave, would be the second wave that you had given her? A. Yes.

Q. And, of course, there is nothing there to wave any more? A. No, there isn't.

(Deposition of Mrs. Adaline Jorgenson.)

Q. Do you see Sandra very often around her school activities or home since——

A. Oh yes.

Q. ——this wave? A. Yes.

Q. Do you know from your own personal observation that the hair in relativity to growth has been about approximately the same now as since losing it in 1955?

A. I would say it was about the same.

Q. Do you know of your own knowledge by observation whether or not the loss of the hair, her association among other children, students in school and grown people, has caused Sandra a great humiliation and embarrassment? [274]

A. I know it has.

Q. And from your observations of Sandra has it or not affected her personality?

A. Yes, I would say it has.

Q. From your own personal observation of her do you know as to whether or not it has caused her great and grievious mental suffering and disturbance?

Mr. Packard: The question calls for a conclusion of this witness.

The Court: It seems to me so, yes, Mr. Lanier.

Mr. Lanier: It's asking from her observation in a small area and a close association, your Honor.

Mr. Packard: Mental suffering and disturbance is something for a medical question.

The Court: I'll let her answer.

(Deposition of Mrs. Adaline Jorgenson:)

A. Well she didn't like to take part in things like she use to do when she had hair.

Q. All right. What was the condition of her hair, Mrs. Jorgenson, at the time that you started giving her the Cara Nome permanent?

A. She had beautiful hair, and lots of it.

Q. And lots of it?

A. She had lots of hair. [275]

Mr. Lanier: Your witness.

Do you want me to continue the recross?

Mr. Packard: Yes. You go ahead.

Mr. Lanier: (By Mr. Jungroth)

Q. When was this Toni end curl given?

A. Oh, that must be about a year or year and a half before I gave her the Cara Nome.

Q. And was there curl in her hair at the time you gave her the Cara Nome? A. No.

Q. How was she wearing her hair then?

A. Pony tail, I think.

Q. Now, I believe that you testified on direct examination that the solution was kept out of her eyebrows. Do you know——

A. Well, I tried to keep it out, but there is a little bound to seep through the towel.

Q. And she had a towel on her forehead?

A. But the towel gets wet and when you go to wipe it off, it gets a little on your——

Q. She didn't complain of any being in her eyes? A. Not to my knowledge.

Q. And was this towel you put on her forehead, [276] was there any neutralizer placed in that?

(Deposition of Mrs. Adaline Jorgenson.)

A. Well, not until I put the neutralizer on her head, then it would drain off her head on to the towel.

Q. Did you notice her scalp at the time that you put on the solution?

A. It seemed to be in good health. She didn't have any sores or anything on her head.

Mr. Jungroth: I believe that is all.

Mr. Lanier: How about dandruff, did you notice any dandruff, Mrs. Jorgenson?

The Witness: No, I didn't.

Mr. Lanier: Do you know that there was no dandruff?

The Witness: I don't believe she had any dandruff.

Mr. Lanier: That's all.

Mr. Lanier: May it please the Court, I do not believe it's a matter for the jury—at least at this time—may I have the original please—but I request the Court to read and take note of the record on the last page following that deposition. [277]

(The Court reads to himself the material requested by counsel.)

Mr. Packard: I submit to the Court—your Honor may want to read it, but I think it's immaterial——

Mr. Lanier: I am not sure at all it's material at this time either, counsel, but it depends on what develops as we go.

The Court: I don't see there is anything there I can do about it——

Mr. Lanier: I just wanted the Court to take

note because something might come up down the line that I have not anticipated yet.

Could I have Dr. Martin's deposition?

(The Clerk furnished counsel with Dr. Clarence S. Martin's deposition.)

Whereupon,

DEPOSITION OF DR. CLARENCE S. MARTIN witness for the plaintiff, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, before the Court and Jury, as follows:

Dr. Clarence S. Martin, a witness called at the request of the plaintiff, being first duly sworn to testify to the truth, the whole truth, so help him God, thereupon testified as follows: [278]

Direct Examination

Q. (By Mr. Lanier): Would you state your name? A. Dr. Clarence S. Martin.

Q. And where do you live, doctor?

A. Kensal, North Dakota.

Q. Are you a Doctor of Medicine? A. Yes.

Q. And how long have you been practicing in Kensal, North Dakota? A. Nine years.

Q. Would you tell me, Doctor, where you got your Medical Degree?

A. The University of Pennsylvania in Philadelphia.

Q. In what year? A. 1943.

Q. And where did you do your internship?

A. The Presbyterian Hospital in Philadelphia.

Q. And what year did you finish that?

(Deposition of Dr. Clarence S. Martin.)

A. 1944.

Q. And since that time have you, Doctor, gone to any further medical school?

A. I spent a little over two years in the Army, and I spent, after my Army term was up, from which I was—what would you say, dismissed? How do you get out? [279]

Mr. Jungroth: Discharged.

A. (Continuing) I was discharged as a Captain, I spent six months in a refresher course in medicine and surgery at Harvard Medical School.

Q. Have you had any further education or training than that, Doctor? A. No, sir.

Q. Have you practiced medicine, with the exception of your Army practice, in any other community other than Kensal? A. Yes.

Q. And where was that, Doctor?

A. At Elwin, Pennsylvania.

Q. How long did you practice there?

A. For approximately a year.

Q. So that you have actually practiced your profession of medicine for the past 14 years, is that correct? A. Approximately so, yes.

Q. Doctor, you are, I believe, a general practitioner, is that correct? A. Right.

Q. You are not a specialist in any particular field? A. No, sir.

Q. And in particular you do not claim to be a dermatologist? A. That is true. [280]

Q. Your practice at Kensal is of the general practice the nature of which covers every possible

(Deposition of Dr. Clarence S. Martin.)

matter of sickness and injury that a patient can come in to see you on I presume? A. Yes.

Q. All right. Now, Doctor, refreshing your mind, have you ever had occasion to have as a patient a minor child by the name of Sandra Nihill?

A. Yes.

Q. And approximately, and generally speaking, how long has she been a patient of yours?

A. I saw Sandra Nihill first on the 29th of October, 1948 and have doctored her on four occasions, well, three occasions previous to the incident which I saw her concerning her loss of hair.

Q. And, Doctor, have you not also been the general family doctor for her entire family?

A. Yes, sir.

Q. And you are well acquainted with the Nihill family? A. Yes, sir.

Q. And are thoroughly versed in their physical background? A. Yes, sir.

Q. And, Doctor, from your observation, from your treatment and from your general history of the treatment of Sandra Nihill, can you state for the benefit of the [281] jury what her general physical condition has been prior to the particular point in question and up to that time?

A. She has been a healthy, normal girl, quite active in sports, and with no unusual ailments or illnesses.

Q. And can you tell me, from her family background, the other members of her family, particularly her father and mother, from your same obser-

(Deposition of Dr. Clarence S. Martin.)

vations and experience as their family doctor, what the general status of their health has been?

A. The family has been in good health. The illnesses have been always of a minor nature.

Q. Well, now, for instance the other illnesses of Sandra Nihill prior to your examination of her in February in 1955 have been of what nature generally?

A. Well, from my records I copied the following list: I saw her on the 29th of October, 1948 for a slight cold, cough and ear ache, which cleared up under medication right away. Again on the 15th of February, 1949, she had another head cold with a slight catarrhal otitis, a coat on the ear. And on the 13th of July, 1949, she came in with abdominal pain, which I wanted to exclude appendicitis, and and excluded appendicitis. Mesentery adenitis was my diagnosis for that particular ailment. That [282] means a cold in the abdomen.

Q. Now, Doctor, in the entire case history, in your experience as a family doctor, has either Sandra Nihill or any of the members of her family, particularly her father and mother, or any other members, had any indication to you of any skin allergies of any kind? A. No.

Q. And both during the time of this hair loss, and since, have you at any time found any indication of a skin allergy?

Mr. Packard: You were going to withdraw the question and reframe it, counsel.

Mr. Lanier: All right.

(Deposition of Dr. Clarence S. Martin.)

Q. At any time, prior to this hair condition, during your examination of the hair condition and scalp, or since, in the case of Sandra Nihill, have you ever had any occasion to find, or indication of any allergy? A. No.

Q. Now, Doctor, when was the first time, after the application of the Cara Nome Rexall permanent cold wave home solution, and on what date thereafter, did [283] you first see Sandra Nihill?

A. I saw Sandra Nihill on the 28th of February, 1955.

Q. You first saw her on the 28th of February, 1955, for this particular scalp and hair condition?

A. Because she was losing hair in large amounts.

Q. Now, Doctor, would you please state for the benefit of the jury the general condition of her scalp at that time?

A. She showed rather extensive loss of hair. There was some irritation on her scalp, and I was suspicious at first of a fungus infection of the scalp as the cause, so I looked at her head, scalp, in a dark room under the Wood's light, which will show up fungus infections, and I didn't see any indication of fungus infection, and I paid particular attention to the areas in which I saw some inflammation which showed any scaling and slight dermatitis.

Q. So you did find slight inflammation, scaling and dermatitis? A. Yes.

Q. Now, Doctor, as a result of that original ex-

(Deposition of Dr. Clarence S. Martin.)

amination, did you make any prescription for use of Sandra? A. Yes.

Q. And what was that, Doctor? [284]

A. I prescribed salsum, which is an Abbott's prescription, for the treatment of seborrheic dermatitis.

Q. Now, Doctor, is that or not, in the general practice of medicine in your locality, area, a standard and accepted medication for the use in treatment of the scalp where you have the findings such as you have described?

A. Yes. If the scalp is not too inflamed, it is indicated in treating mild inflammations of the scalp such as due to ring worm or seborrheic dermatitis.

Q. Now, Doctor, when did you have the next occasion to see Sandra Nihill?

A. Well, I had seen her once before that, in February, I might mention, in a routine basketball examination before the tournaments.

A. All right, one moment on that. Now what date in February had you seen her?

A. I don't have the date, I didn't note that on her record because it was a routine school basketball examination, but it was previous to the basketball tournaments, a few days previous to that, or it must have been more than that. Anyway, the girls had not had their basketball examination and the tournaments were coming up, and they were sent down to my office for examination, and I [285] failed to look up the date, but it was in the prox-

(Deposition of Dr. Clarence S. Martin.)

imity of a week or so before the basketball tournament at which time I found nothing wrong with Sandra Nihill, nor did I find anything wrong with any of the other girls.

Q. Yes. She was examined just as one of many on the basketball team? A. Yes.

Q. All right now, Doctor, after your examination of February 28th when did you next examine Sandra Nihill?

A. My records show on the 6th of July, 1955.

Q. Will you tell me what the result of your examination and observations at that time were?

A. At that time she had lost practically all of her hair, and there were some short hairs growing in the bald areas to maybe a half an inch or so.

Q. Do you recall, and do your records show, what the condition at that time of either inflammation, irritation, or scaling was?

A. There wasn't any inflammation or irritation that I noticed on the scalp at that time, but I was quite concerned and called Dr. Sorkness in Jamestown to get the name of a reputable dermatologist so I might send her for examination and evaluation.

Q. And what name did you get? [286]

A. Dr. Melton from Fargo.

Q. He is with the Dakota Clinic in Fargo?

A. Yes.

Q. And did you not cause her to be sent to Dr. Melton for examination? A. I did.

Q. And since that time, for the scalp condition,

(Deposition of Dr. Clarence S. Martin.)

has she any further been your patient since that time? A. No.

Q. Have you had occasion, nevertheless, to see Sandra locally in Kensal in social or school activities, functions, since then?

A. Well, I see her now and then during the week, pass her on the street. Other than that I have had no professional contacts with her.

Q. I believe you are also president of the school board of Kensal, are you not, Doctor? A. Yes.

Q. And interested in school activities?

A. Yes.

Q. And in connection with that, and in the smaller town of Kensal, you do see her occasionally?

A. That's right.

Q. Do you know of your own knowledge that her hair is in approximately the same condition as it was when you last saw her? [287]

A. You mean on the 6th of July?

Q. Yes, by observation.

A. I have not seen her without covering on her head since the 6th of July.

Q. Since that time. All right, Doctor. Now, Doctor, based on your medical training and education, based upon your general experience in the practice of medicine, based upon your personal observation, diagnosis, and prognosis, of Sandra Nihill, have you or not an opinion, based upon reasonable medical certainty, as to whether or not the condition of baldness in the scalp, head and hair of Sandra is or is not permanent? A. I have a——

(Deposition of Dr. Clarence S. Martin.)

Mr. Lanier: Let's hold to make sure.

Mr. Packard: One moment.

Mr. Lanier: Take your time, counsel.

(Counsel for defendants confer.)

Mr. Packard: I have no objection.

A. I have a qualified opinion.

Q. All right, would you please state that opinion, Doctor? [288]

A. Well, I would, my opinion is that this loss of hair may well have been due to the home permanent, but certainly I do not feel it can be proven for sure one way or the other.

Q. Now, Doctor, I am going to come to that question, because that actually does not quite embody the question which I asked you. My question only asked as to whether or not you felt the loss of hair, and the scalp condition, was permanent, yes or no?

A. I didn't answer your question directly——

Q. And now you may answer.

A. I would feel that there was more probability that this will be a permanent loss of hair than that it will not be, although I am in no position to say definitely one way or the other.

Q. All right now, Doctor, I want to ask you one more question which you really, in a way, have answered already, but so I get in the foundation to it I want to repeat it. Based upon your medical training and experience, based upon your observation, diagnosis and prognosis of the patent, Sandra Mae Nihill, do you have an opinion, based upon

(Deposition of Dr. Clarence S. Martin.)

reasonable medical certainty, as to whether or not the application of a cold waving, cold wave solution to the scalp of Sandra Nihill, on or about February 5th, 1955, containing a chemical solution of ammonium thioglycollate, could [289] cause the condition of the scalp that existed as you saw in Sandra Nihill on February 28th, 1955, and July 6th, 1955?

Mr. Packard: Just a moment, Mr. Lanier. I object your Honor. It is an improper hypothetical question in that it does not have a proper basis for a hypothetical question. Any specific ingredients of thioglycollate acid, and so forth. He says "a solution", and we know that all these wave solutions have the same basic ingredients and certainly it would be speculation, it says "could have caused", and we are not dealing with speculation, but within reasonable medical certainty.

The Court: I think that was included in the answer to the question, was it not?

Mr. Lanier: It was, your Honor.

The Court: The answer may be read.

A. Yes.

Q. Would you state that opinion, please?

A. I feel, from the presence of the——

Mr. Packard: The same objection, your Honor.

The Court: You may have you objection and exception.

A. I feel, from the presence of the inflammation in her scalp, and the absence of any evidence

(Deposition of Dr. Clarence S. Martin.)

of fungus infection under the Wood's light, that this condition which I saw on her scalp and in her scalp on the 28th of February, 1955, may well have been due to a chemical irritant such as you mentioned was in the home permanent.

Q. Now, Doctor, do you have with you a copy of your bill for services performed on Sanda Nihill? A. No.

Q. Do you recall personally what that bill was?

A. Four dollars.

Mr. Lanier: Your witness.

Mr. Packard: Do my job for me.

Mr. Lanier: (Resuming reading Cross-Examination.)

Q. (By Mr. Jungroth): Now, Doctor, did you treat this particular patient in question here for diphtheria, Sandra Nihill, was she your patient, was she treated for diphtheria, do you recall?

A. No, sir.

Q. How about scarlet fever? A. No, sir.

Q. Or Pneumonia? A. No, sir.

Q. Typhoid? A. No, sir.

Q. Not at least during the time you saw her she did not have these particular maladies?

A. Not to my knowledge.

Q. And I believe you stated that prior to the time that this hair issue came up that you saw her on three occasions. Now, you saw her for a cold on October 28th, 1948? A. Correct.

Q. What treatment did you give her at that time?

(Deposition of Dr. Clarence S. Martin.)

A. I did not bring the record of my treatment with me so I cannot answer the question.

Q. Well, Doctor, on February 15, 1949, I believe you said she had a head cold and a cold in the ear? A. That is right.

Q. What treatment did you give her at that time?

A. As I have previously mentioned, I used the routine treatment for cold, and I didn't bring the record of my treatments with me.

Q. What would your routine treatment for cold be then, Doctor?

A. I would have to suppose in this case, I am not sure what I gave, but I think I used probably some penicillin [292] and one of the antihistamines for congestion.

Q. Would you have given any sulpha drugs?

A. No.

Q. And on July, 1949 she had an abdominal pain that you, I believe, diagnosed, in laymen's language, as a cold or infection in some of the glands of the stomach, is that correct?

A. Yes.

Q. And what treatment did you give for that?

A. If I remember correctly, I gave no treatment. I wanted to differentiate from appendicitis and I felt I substantially did that, and so I didn't treat it.

Q. Were there any further complaints about the abdominal pain.

A. It was just a pain that she had in the right

(Deposition of Dr. Clarence S. Martin.)

side of her abdomen and her parents brought her in to make sure. Her white count was normal and her abdominal examination was not acute, did not show any acute inflammation so I discharged her as not having appendicitis.

Q. And I believe, Doctor, you made some statement in the record with reference to any possible allergy with this girl?

A. I made a statement previously here that there was no evidence of allergy in her.

Q. Yes, that is what I mean. Did you run any of the [293] standard allergy tests?

A. No.

Q. There are a number of tests used for allergies?

A. There are. There are tests used for allergy in which a doctor will maybe run 125 different allergens to test the patient for sensitivity to different things.

Q. You didn't test this patient for sensitivity to ammonium thioglycollate? A. No.

Q. Nor test her for an allergy to any other cosmetic or soap?

A. No. I based that answer on the fact that she has not shown the evidence of allergy that the general practitioner sees so frequently in his practice.

Q. In other words, she didn't have the hives from eating tomatoes or some such thing as that?

A. Asthma or skin rashes, various manifesta-

(Deposition of Dr. Clarence S. Martin.)

tions of allergy are evident to a general practitioner.

Q. Now, Doctor, I believe you stated you saw the plaintiff in February for a routine checkup for her playing girls' basketball at Kensal High School? A. Correct.

Q. What examination was given her at that time?

A. There on the basketball examinations we examine their heart, the appearance of their skin, the throat, we [294] examine for fever, blood pressure, and general appearance.

Q. Do you recall whether or not you examined her scalp?

A. I did not, or I do not recall.

Q. And then, Doctor, I believe that you stated on February 28th, 1955 she contacted you with reference to a scalp and hair condition?

A. Yes.

Q. And at that time were there any pustules evident in the scalp?

A. Not pustules, but there was inflammation.

Q. And was there any scaling at that time?

A. Slight scaling.

Q. Now, Doctor, I believe that you stated that you prescribed a preparation known as selsum which is made by the Abbot Laboratory?

A. Abbot, yes.

Q. Now, that product is primarily used in the case of an infection to the scalp rather than a chemical injury to the scalp, isn't it?

(Deposition of Dr. Clarence S. Martin.)

A. It is used as a preparation to combat fungus infections and seborrheic dermatitis, and also as a stimulant to the scalp itself because of the sulphur which is present. Therefore, I cannot say that it could not be used in a chemical dermatitis, but it [295] might be used as sort of a stimulant to create a better health so that the hair would commence to grow again.

Q. How is selsum used, Doctor?

A. The directions I had for Miss Nihill was that she apply once a week. It is used after a soap shampoo of the hair, massaged into the scalp for five minutes, allowed to stay there for that time, and then rinsed out, and then it is used again for another five minutes and allowed to stay there for that length of time and then rinsed out thoroughly with several rinsing of water so that you do not leave any of the medication in the scalp, and they may use soap on the second rinsing.

Q. And actually selsum, if improperly used and left on the scalp, can cause falling hair?

A. I am not qualified to answer that. It could cause falling hair, but it is a medicine that is not to be left on the scalp.

Q. And then I believe, Doctor, you said that you saw her on July 6th, 1955? A. Yes.

Q. And at that time her hair was substantially gone on her head, is that correct? A. Yes.

Q. And you didn't see her between February 28th and July 6th professionally?

A. No. Now by the time I saw her on July

(Deposition of Dr. Clarence S. Martin.)

28th she had lost much of her hair. There were many large areas of the hair gone and coming out rapidly.

Q. Now, Doctor, when you saw her at that time was it coming out in more or less patches, here and there?

A. It is true that there were areas where there was more hair lost than others. It was just a complete general diffuse loss of hair, but the hair was coming out all over.

Q. But there were patches?

A. There were areas where there was more hair loss than others.

Q. Wouldn't that lead you to an alopecia areata condition more or less?

Mr. Lanier: That question is objected to by myself, your Honor, as not a proper question hypotheically, as not a proper foundation to a hypothetical question, as not including all of the medical or physical facts in evidence.

The Court: What was the question again, please?

Mr. Lanier: Wouldn't that lead you to an alopecia areata condition, more or less?

Mr. Packard: Your Honor, if I may be heard in the matter. It is merely asking a doctor, who is a qualified MD, who expressed many opinions on direct examination, as to causes of permanent damage to the hair, injury to the hair, it's just asking him whether this could not have been alopecia areata.

Mr. Lanier: I'll withdraw the objection, your Honor.

(Deposition of Dr. Clarence S. Martin.)

The Court: You may answer.

Q. That diagnosis was considered by me, and on the basis of inflammation of the scalp, slight inflammation, I did not feel that I was able to make a diagnosis of alopecia areata.

Q. Now inflammation, Doctor, you mean more or less a redness, is that correct?

A. Yes. Some irritation and scaling.

Q. Now, Doctor, I believe that you said your bill for services were $4.00?

A. That is for the 28th of February. I remembered looking at the bill on the back of my card before I left for here. That's why I stated that.

Q. And what all did you do that time you saw her; how much checking did you do with the girl?

A. Well, it was primarily in relation to her scalp.

Q. Now, with relation to the scalp, how much checking did you do? Did you merely look at it under the Wood's light and then under an ordinary light?

A. I looked at her scalp and part of the hair and examined for broken off ends that you see with a fungus infection, where fungus is chewing on the roots of the scalp, and then I took her into the dark room and examined her under the Wood's light.

Q. Did you examine any of the hairs of her head under the microscope to determine whether any of the ends were frayed?

A. No, I did not.

(Deposition of Dr. Clarence S. Martin.)

Q. And, Doctor, you of course actually had no way of knowing of your own knowledge that this particular individual used a home permanent on her head aside from what she told you, is that correct? A. That is correct.

Q. And you, of course, are a general practitioner and don't specialize in dermatology?

A. Correct.

Mr. Jungroth: That is all. [299]

Mr. Lanier: Now, may I have the deposition of Dr. Melton? I believe that is before you, your Honor, and we do have another copy of that, so it can be used by the Court.

The Court: What deposition is that, Mr. Lanier?

Mr. Lanier. That is Dr. Melton.

The Court: You may proceed.

Thereupon,

DEPOSITION OF DR. FRANK M. MELTON

witness for the plaintiff, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, before the Court and Jury, as follows:

Mr. Lanier: (Reading.)

Dr. Frank M. Melton, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Q. (By Mr. Lanier): Would you state your name, please? A. Frank M. Melton.

Q. What is your business?

(Deposition of Dr. Frank M. Melton.)

A. I am a physician and dermatologist.

Q. Where do you live? [300]

A. Fargo, North Dakota.

Q. Are you associated with any clinic in Fargo, North Dakota? A. With the Dakota Clinic.

Q. Where did you get your medical training, Doctor?

A. University of Louisville, Kentucky.

Q. Are you a graduate in medicine of that university? A. Yes.

Q. In what year did you graduate?

A. 1939.

Q. Where did you do your interning?

A. At the General Hospital at Louisville.

Q. Doctor, do you have any special field?

A. Yes, dermatology.

Q. Are you a specialist in the field of dermatology? A. Yes.

Q. Where did you receive your special training?

A. At the University of Pennsylvania and Duke University.

Q. In what years did you receive that training?

A. '46 to '49. The war was over in '45—'46 to '49.

Q. Were you or not in the armed services?

A. Prior to that, yes.

Q. In what service were you?

A. Public Health Service.

Q. How long were you in that field? [301]

A. From '41 to '46.

(Deposition of Dr. Frank M. Melton.)

Q. I presume that you took your special training after you were out of the Public Health Service? A. That is right.

Q. For the benefit of those people who are on the jury who do not understand that, including your present legal examiner, would you state when you take special training, for instance in dermatology, what it results in? Do you get a diploma or a special degree, or just exactly what is it?

A. You are examined by a Board of Examiners and you are certified by that board.

Q. What board of examiners?

A. American Board of Dermatology.

Q. That is a national Board? A. Yes.

Q. You were examined by that board and have passed the qualifications required by them and have been certified as a dermatologist?

A. That is right.

Q. How long in that particular specialty have you been practicing? A. Since '49.

Q. Where has your practice been?

A. In Fargo. [302]

Q. Have you been located in Fargo, North Dakota, ever since? A. Yes.

Q. Have you since that time, after 1949, been associated with the Dakota Clinic? A. Yes.

Q. With which you are still practicing?

A. Yes.

Q. Again for the benefit of the lay people on the jury, will you tell me what the field of dermatology is?

(Deposition of Dr. Frank M. Melton.)

A. It is a study of the diseases of the skin.

Q. That study of the diseases of the skin, does that or not include the scalp and the hair?

A. Yes.

Q. The scalp, I presume, also being a part of the skin and part of the special field of dermatology? A. Yes.

Q. Do you have your records with you in reference to your observation and treatment of one Sandra Mae Nihill? A. Yes.

Q. When, Doctor, did you have occasion to first see Sandra Mae Nihill?

A. On August 9, 1955.

Q. Doctor, would you state briefly for us what the case [303] history you have shows concerning Sandra Mae Nihill when she first came in to see you?

A. You want me to give that in detail?

Q. Refreshing your memory from your own notes, give it as you see fit, as you have it.

A. Her family history, there was no loss of hair. Her past history, she had had pneumonia as a child, and she had a tonsilectomy. There was no illness the previous year. She was examined by myself and by one of our internists and we found no abnormality other than of the scalp.

Q. That, briefly, is your answer to my question as to history?

A. Yes. I haven't discussed the scalp.

Q. All right now, let me ask one or two questions and bring this up to date. You have first of

(Deposition of Dr. Frank M. Melton.)

all stated that she has no history of family baldness. Would you state to the jury why you have inquired into the girl's history in that respect?

A. We inquired into that because some times there is a family type of losing hair; in other words, it will run in families.

Q. Can that be traced to heredity?

A. It would be hereditary, yes.

Q. Did you or not find anything in this girl's family [304] history to trace it to that type of hereditary loss of hair? A. No.

Q. One other thing. You said as a child she had pneumonia. Does that or not have any bearing on the case at all?

A. No, I wouldn't think so.

Q. As to the scalp, would you give her case history there?

A. We found that the hair was short all over the head. There were dark hairs interspersed with very fine hairs. There were many dark hairs broken off at the roots. There were also so follicular pustules in the scalp—that means where the hair has come out of the scalp. There had been a loss of eyebrows. The hair of the axilla and pubic area was sparse, but the mother stated that this is a family trait. The hair was not loose when pulled. There were no other lesions of the scalp, hairline, or rest of the skin. Examination of her by Wood's light showed no abnormalities or fluoresence. Examination of the hair under a microscope showed no spires or mycelium on the hairs.

(Deposition of Dr. Frank M. Melton.)

The hairs were frayed and broken off at the ends. Approximately twenty hairs were examined. Laboratory studies were normal. Radio active iodine test was normal. And a biopsy of the scalp was [305] reported. Sections show somewhat keratinized stratified squamous epithelium which is everywhere composed of mature and well-differentiated cells. The basal layer is well defined. Several hair follicles are seen showing some irregular budding of the follical epithelium. Yet there is no cellular stypia. The follicles contain keratinized material. They appear consequently atrophic. A couple of sebaceous glands are noted. There is no perifollicular infiltrate at all. The aforementioned sebaceous glands are slightly smaller than expected. The basal layer of the epidermis shows no pigmentation. A few sweat glands are also ascertained. Pathological diagosis: The histopathological picture shown by this submitted specimen is compatible with alopecia. It is not possible to differentiate, as to type, since the determining criteria (like inflammatory infiltrates) are absent.

Q. One or two things concerning that case history and finding. First of all, would you tell us by your records what date you first examined this little girl? A. August 9, 1955.

Q. Also could you tell us what your records show her age to be?

A. Her birthdate was 12-2-41.

Q. Making her at the time of the examination 14 years [306] old? A. Fourteen.

(Deposition of Dr. Frank M. Melton.)

Q. Also from your case history, what is the date, if any, in your history shown, that she was first examined and treated for this condition by Dr. Martin of Kensal, North Dakota?

A. I don't know the date when she first saw him.

Q. Was she or not referred to your office or clinic and to you by Dr. Martin?

A. Well, it would be by Dr. Martin and Dr. Sorkness.

Q. Dr. Sorkness being in the Sorkness and Dupuy, the Stutsman County Clinic, I believe, or the Jamestown Clinic?

A. The Dupuy-Sorkness Clinic.

Q. Of Jamestown, North Dakota?

A. Yes.

Q. She was a referred patient from another doctor? A. Yes.

Q. What does your record show in her case history as to when she first had this loss of hair?

A. It was in February of '55. I don't have the exact date.

Q. What do your records show in your case history as to when she made an application or caused an application to be made of the hair wave solution on her hair? [307]

Mr. Packard: I am waiving my objection.

A. According to my history, she had her permanent in '55, February, '55, and you want to know when she began to lose her hair?

Q. Yes. A. Within a week.

* * * * *

(Deposition of Dr. Frank M. Melton.)

A. Within a week she began to lose her hair.

Q. Was that within a week after the application of the hair wave solution?

Mr. Packard: I'm withdrawing my objection to those questions.

A. Yes.

Q. (By Mr. Lanier): You have stated in your findings that inflammation was absent. Will you tell us whether or not on your tests made there was any physical abnormal findings of any kind so far as the scalp was concerned?

A. Let me clarify that. We found a few boils of a special type in that they were around the hair follicles, where the hair comes out.

Q. Did I understand you to say that those were boils? A. Yes.

Q. A boil being what? [308]

A. A boil being a collection of pus, stimulated by either infection or foreign body. In other words, if you get a sliver in your finger, pus or polynuclear cells are formed.

Q. And that finding was an objective finding in your examination of this girl?

A. Yes. To prevent confusion here, the pathologist didn't find any what we call inflammatory infiltrate. It is the same thing, because he is speaking in terms of something deep while I found something on the surface.

Q. And this examination is approximately six months after her original medical examination and treatment for this condition?

(Deposition of Dr. Frank M. Melton.)

A. You mean her being examined by somebody else?

Q. Yes. A. I don't have the date.

Q. From your case history that you do have, this examination takes place approximately how long after her original loss of hair?

A. My examination?

Q. Yes. A. Six months.

Q. Did you or not, Doctor, find any inflammation of the scalp other than you have already described? A. No. [309]

Q. Did you find any scaling of the scalp?

A. Not enough to make any note of.

Q. For the benefit of the jury again, Doctor, would you tell me what the Wood's light is?

A. The Wood's light is a type of ultraviolet light which has a special filter which allows only rays of a certain narrow band of wave length to be emitted.

Q. What is the purpose of the examination by means of a Wood's light?

A. A Wood's light is used for examination for ringworm of the scalp type, in which case the infected hairs fluoresce or glow with a greenish color similar to that seen on a luminous dial of a watch.

Q. You have also stated that you caused to be done a biopsy of the scalp? A. Yes.

Q. Would you explain what that is?

A. To remove a small piece of tissue to send it to a pathologist, who then prepares it in such a

(Deposition of Dr. Frank M. Melton.)

way that it can be cut in very small sections and examined under high-powered microscope.

Q. As a result of this biopsy, and as a result of her family history, and as a result of your own findings, both objectively and subjectively, did you ascertain a physical reason for the loss of hair?

A. No.

Q. Did you find any reason to presume, medically, with a reasonable degree of medical certainty, that this girl had any allergy? A. No.

Q. At one time you used the term "atrophic". Would you explain to the jury first of all by way of repetition what you found as to any atrophic condition within the follicles or the hair bulbs?

A. An examination by the pathologist reported that the hair follicles appeared athrophic.

Q. What do you mean by that statement?

A. I think the simplest way to explain it would be a shrinkage of a tissue.

Q. Do we or not refer to atrophic as a permanent or non-permanent condition?

A. I think it could be either one.

Q. In this particular case which do you refer to it as? A. Not specifically either one.

Q. Not either one? A. No.

Q. When was the last time that you examined this girl? A. September 21, 1955.

Q. Between the time of your first examination of August 9, 1955, and until your last examination of September [311] 21, 1955, did you or not ascertain any difference in regard to hair growth?

(Deposition of Dr. Frank M. Melton.)

A. No, there was not much change.

Q. I will show you plaintiff's Exhibits A and B, which purport to be photographs of Sandra Mae Nihill's skull and scalp. From a purely visual standpoint, would you tell me in general whether or not the scalp and head of Sandra Nihill appear in those two exhibits, A and B, approximately the same as they did to you upon your visual observation both on August 9th and September 21, 1955?

A. Yes.

Q. Doctor, in the course of your testimony you have referred to the term "alopecia". Will you tell me for the benefit of the jury what in medicine, and particularly in dermatology, alopecia as such is? A. Alopecia means the loss of hair.

Q. There is testimony in this case by other doctors to a possibility that Sandra Nihill has a condition known as "alopecia areata". For the benefit of the jury, would you tell me what the term "alopecia areata" means?

A. Alopecia areata is a non-scarring type of losing hair.

Q. What is the cause of alopecia areata?

A. The cause is unknown.

Q. Is that what the term itself implies in medicine? [312]

A. I don't know what the term "areata" actually refers to.

Q. Is alopecia areata in medicine the loss of hair from causes unknown? A. Yes.

(Deposition of Dr. Frank M. Melton.)

Q. I presume "causes unknown" could cover a multitude of unknown reasons?

A. It would be legion.

Q. By "legion", for the benefit of the jury, you mean many? A. No end.

Q. One other thing about alopecia areata, is it or not normal to find any inflammation of the scalp with alopecia areata?

A. Usually there is no change at all.

Q. Would it be correct to state that the finding of any inflammation or scaling of the scalp would be foreign to a general finding of alopecia areata?

A. That would not be the usual finding.

Q. If such a condition existed you would not normally expect alopecia areata?

A. That would be one of the things that would make it questioned.

Q. Based upon the case history which you have of this girl, based upon your own findings, subjectively and [313] objectively, based upon your knowledge of her scalp conditions as a dermatologist, and based upon the further fact that as of this date as we take this deposition, the testimony should show that Sandra Mae Nihill has received no basic return of hair to the scalp, do you have an opinion, based upon reasonable medical certainty, as to whether or not this condition is permanent? You can answer that yes or no.

A. How long has it been, almost two years?

Q. A little over.

A. In view of the fact it has been two years——

(Deposition of Dr. Frank M. Melton.)

Q. Yes or no first, as to whether or not you have an opinion. A. Yes.

Q. Would you state that opinion, please?

A. I think in view of the fact that this has persisted for two years that it is most likely that the hair will not return.

Q. That is your medical opinion at this time?

A. Yes.

Q. Is that your medical opinion? A. Yes.

Q. After that period of time, would it or not be unusual for it to now return?

A. I would say it would be unusual for it to return. [314]

Q. Doctor, are you or not acquainted with a book on dermatology written by a Dr. Donald W. Pillsbury, Dr. Walter B. Shelley, and Dr. Albert M. Kligman and published by W. B. Saunders Company? A. Yes.

Q. Is that a comparatively recent work, widely used by dermatologists?

A. Yes. I don't know how widely it is used. The authors would be known to most dermatologists.

Q. It is a text book with which you are familiar?

A. Yes.

Q. If this text should quote as follows——

Mr. Packard: We object, your Honor, to the use of any text books as being improper in this State. To examine medical witnesses by the use of text books, you——

(Deposition of Dr. Frank M. Melton.)

Mr. Lanier: I think that is correct, Counsel, and I'll withdraw the offer of it right here.

Q. Doctor, normally, in alopecia areata, does the hair normally start its loss in patches?

A. Yes.

Q. And the total loss in the entire scalp area normally would not be compatible with alopecia areata? [315]

A. It could begin—it begins in patches but it could involve the entire scalp.

Q. Normally, you would expect it to begin in patches? A. Yes.

Q. Doctor, are you or not in a general way acquainted with the normal chemical composition of hair wave solution and its neutralizers?

A. Just generally.

Q. Are you acquainted with ammonium thioglycolate? A. Yes.

Q. Are you or not aware that most hair wave solutions contain ammonium thioglycolate?

A. Yes.

Q. Are you aware that most hair wave kits, home kits containing neutralizers normally contain potassium bromate?

A. Yes, I think it is. I am not sure about that.

Q. Will you tell me whether or not from your studies and findings ammonium thioglycolate as such in certain concentrates can or cannot be harmful to the skin or scalp?

The Court: There's an objection there.

(Deposition of Dr. Frank M. Melton.)

Mr. Packard: I object on the ground it is speculative and not a [316] proper foundation laid.

The Court: I think he may answer.

A. It can be harmful in the sense that other allergic reactions can occur in concentrations that are used. Alopecia may occur and toxic reactions have been reported.

Q. And toxic reactions have been reported?

A. Yes. On the toxic reactions there have been controversial studies or reports as to their exact nature.

Mr. Lanier: We can skip that next I believe now, counsel.

Mr. Packard: Yes.

Q. (By Mr. Lanier): Doctor, we have discussed follicles. For the benefit of the jury, can you tell me what a follicle is?

A. A follicle is the structure on your scalp from which the hair grows.

Q. When you say "from which the hair grows" are you talking about each individual shaft of hair?

A. Yes.

Q. And at the base and below the scalp is there or not a hair bulb?

A. The hair bulb grows out of the follicle. [317]

Q. And basically that is about the structure of an individual hair in the head. Is that correct?

A. Yes.

Q. Will you tell me whether or not the natural

(Deposition of Dr. Frank M. Melton.)

oils of one's hair progress up and down these shafts of hair?

A. The oil glands empty into the side of the follicle.

Q. And from there do they or not go on out into the hair shaft? A. Yes.

Q. And conversely, any foreign chemical applied to the hair externally, can that progress down the hair shaft into the follicle and under the scalp?

A. Yes.

Q. And if that chemical were of a harmful nature could it reach the area of the hair growth where it could be harmful?

Mr. Packard: I object to it, that's too speculative.

The Court: Overruled. He may answer.

Mr. Packard: No proper foundation laid.

The Court: Overruled.

Q. (By Mr. Lanier): Medically is that physically a possibility? [318]

Mr. Packard: Object to that question upon the ground—a "possibility", we are not dealing in possibilities or probabilities, but medical certainty. It's too speculative.

The Court: I doubt if medical certainty is required there.

Mr. Packard: Reasonable medical certainty. Possibility? A lot of things are possible.

Mr. Lanier: That's a physical matter, your Honor. That's not a medical opinion.

The Court: He may answer.

(Deposition of Dr. Frank M. Melton.)

A. It can penetrate down through there.

Q. You referred that this patient, at the time you examined her hair to a loss of eyebrows.

A. Yes.

Q. Medically, in relation to alopecia what is your general conclusion on the loss of eyebrows, generally, if any?

A. Loss of eyebrows or hair elsewhere on the body would be more likely to occur with alopecia areata.

Q. Did you find any other loss of hair other than the eyebrows and scalp? [319]

A. The hair elsewhere on the body was sparse, but the mother gave a history that this was a family trait.

Q. If the directions on the bottle and container of the particular hair wave solution here used, and if the proof should so show that those directions first stated a use of approximately one-half of the hair wave solution in saturation of the hair, and after the prescribed time of so many minutes after the curls have been set, and then take whatever remains of that solution and put it in a bowl, the remaining one-half portion left, and pour it over the entire head and scalp, with instructions to catch the residue in a bowl as it poured off your head, from a medical standpoint would it be possible under such a set of directions for the same solution used on your hair to get in your eyebrows?

Mr. Packard: Just a moment, I object to the question on the grounds it's assuming facts not in

evidence. The instructions do not say to pour it over your head.

Mr. Lanier: I will withdraw the question.

The Court: Question withdrawn. [320]

Mr. Lanier: Cross-examination, counsel, by Mr. Jungroth?

Mr. Packard: Maybe, your Honor, this will be a good place to stop.

The Court: I think so. We will let the jury withdraw under the injunction not to talk to anybody about this case, or permit anyone to talk to you about it. Keep your minds free and clear of any outside influences and return to the jury room so as to be ready to be called to the jury box at ten o'clock tomorrow morning. You may withdraw. And the other members of the audience please remain until the jury has withdrawn, please.

(The jury left the court-room.)

The Court: Court may now stand in adjournment until ten o'clock tomorrow morning.

(Whereupon, the hearing adjourned until ten o'clock, April 10, 1958.) [321]

Be It Remembered, that a further hearing was had in the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge Presiding, and a Jury, in the Federal Court Room, Federal Building in the City of Los Angeles, State of California, on April 10, 1958, beginning at the hour of 10:10 A.M.

There were present, at said time and place, the appearances as heretofore noted.

Whereupon, the following proceedings were had in open court:

The Court: The cross-examination of the deposition, I believe, was being read last night. [1]

Mr. Packard: Well, Counsel, do you want to call your Doctor?

Mr. Lanier: No, this is so short that I'm willing to go through with this. Opposing counsel has again said that we should go ahead and read his cross for him, so we will, your Honor.

The Court: Very well.

Mr. Lanier: This is cross-examination, for the benefit of the jury, of the plaintiff's witness, Dr. Melton, the dermatologist from Fargo, North Dakota.

Thereupon, the reading of the

DEPOSITION OF DR. FRANK M. MELTON

witness on behalf of the plaintiff, was resumed, Mr. Lanier reading the questions and Mr. Rourke reading the answers, as follows:

Cross Examination

Q. (By Mr. Jungroth): I have just a few questions to clear my own mind up. We were discussing the case history of the patient in Mr. Lanier's examination of you. Isn't the case history of the patient just what this particular patient and her mother told you? [2]

A. Well, my report I have given you would be broken up into two parts. One would be the history, whatever I have obtained from the patient

(Deposition of Dr. Frank M. Melton.)

and her mother. The second, the examination of the patient by myself or from the laboratory studies.

Q. What I was referring to was the history.

A. Yes.

Q. And that was merely gotten from the patient and her mother? A. That is right.

Q. You never saw the father at all?

A. I don't remember.

Q. So you wouldn't know whether he had a heavy head of hair or was completely bald, except for what the mother told you, is that right?

A. Yes, that is right.

Q. And when the mother told you that the lack of pubic hair was a family characteristic you had to take her word for it.

A. That would be her statement.

Q. You didn't examine any of the other family to find out whether that statement was true or not?

A. No.

Q. This was the usual medical practice, to rely on the statement of the patient and the patient's relatives in attempting to arrive at your conclusion? [3] A. That is right.

Q. I believe you said that you examined the scalp and the eyebrow area and discovered that there was a lack of hair on it. Is that right?

A. You mean lack of hair in the scalp. Let me qualify this by saying there is not a total loss of hair.

Q. On the scalp? A. Yes.

Q. But there was a total loss of the eyebrows?

(Deposition of Dr. Frank M. Melton.)

A. Yes.

Q. With reference to the pubic hair of the individual, the other body hair?

A. Yes.

Q. That was very limited?

A. It was sparse, yes, small amount.

Q. If you had seen the patient without the patient communicating anything to you, and you had observed the patient, who had a very sparse growth of hair on the scalp, saw a patient with no eyebrows and very limited body or pubic hair, would your conclusion not be that this is a condition of alopecia areata? A. No, it would not.

Q. Are not those findings very suggestive of alopecia areata?

A. Let me say there is evidence here both for and against that diagnosis. [4]

Q. Would you not be willing to state with reasonable medical certainty that this girl does not have alopecia areata? A. No.

Q. Again will you state what alopecia areata is?

A. Alopecia areata is a condition in which there is a loss of hair, with usually no other skin changes, which usually begins in patches, and they may either have a return of the hair or it may extend and involve the entire scalp with loss of hair.

Q. In other words, it is just growing bald?

A. Yes.

Q. Would you say that describes Mr. Lanier, and it is not unusual?

(Deposition of Dr. Frank M. Melton.)

A. No, Mr. Lanier does not have that type of loss of hair.

Q. It is not unusual for the White or Caucasian race to suffer from this condition?

A. It is not unusual for them to suffer this condition, but it is not the usual type of baldness seen in a male.

Q. But the cause of this alopecia areata is either so many causes that medical science has not discovered it or there is no cause, is that the way to put it? A. It is unknown. [5]

Q. Now the permanent wave solution would be harmful to the eyes if it got in them, would it not?

A. I don't know.

Q. Were allergy tests run on this girl?

A. No.

Q. I have been informed, rightly or wrongly, that a drug known as selsium of the Abbott Laboratory was used in treating this girl. Did you use that drug? A. No, I didn't use it.

Q. What is the purpose of that particular drug?

A. Selsium is a preparation used for the treatment of seborrheic dermatitis.

Q. It would not be used usually in a case of chemical injury of the hair or scalp? A. No.

Q. You would not be willing to state with reasonable medical certainty that this girl's hair would not come back, would you?

Mr. Packard: You objected.

Mr. Lanier: I withdraw that objection, your Honor.

(Deposition of Dr. Frank M. Melton.)

A. Usually if the hair loss has persisted this long, the chances are it will be permanent.

Q. But also the chances could be it could come back? [6]

A. There is that chance, that possibility.

Q. I believe that you stated that you saw this girl for the last time on September 21, 1955?

A. Yes.

Q. You have not seen her since that date?

A. That is right.

Q. So you could not say that since that date that she does not have hair?

A. That is right.

Q. And that you are assuming in your answers that she does not rather than from your own personal knowledge? A. That is right.

Q. To get back to this alopecia areata, I believe that you stated that there are no other changes in the scalp. In certain cases there can be, can there not?

A. I would say it would be very unusual. I would question it.

Q. Did you find scaling? A. No.

Q. The only thing you found you said were boils?

A. Very small, pinhead size boils, and this very short hair which were frayed on the ends when examined by the microscope.

Q. So that actually all that you saw in the patient when she came here and all that your tests revealed was that the girl had very little hair and

(Deposition of Dr. Frank M. Melton.)

that there [7] were some postules (pustules) on the scalp?

A. And that the hair was short and frayed.

Q. And aside from that your investigation objectively revealed nothing?

A. There is one other thing, and that was the atrophic follicles.

Mr. Jungroth: I think that is all.

Redirect Examination

Q. (By Mr. Lanier): There has been some testimony here, both direct and cross, using the term "lack of pubic hair". Is that a correct statement or not?

A. Lack? No, it was not a total loss.

Q. In other words, your answer to that was "sparse"? A. Yes.

Q. In a girl of 14 was the condition of the pubic hair anything unusual?

A. No, because there can be a wide range in the amount of pubic hair, depending on the heredity of the patient and the development of the patient.

Q. Counsel asked you about the use of a medication known as selsium. Is that or not a standard dermatology drug or medicine for use in cases where there is an apparent scaling of the scalp?

A. Yes.

Q. And that a dermatologist would prescribe where there is scaling?

A. Yes. That would not be the only type, but it is a well accepted type.

(Deposition of Dr. Frank M. Melton.)

Q. If the testimony should show that Dr. Martin of Kensal, did prescribe the use of the selsium after ascertaining there was scalp scaling would that be an accepted medical practice? A. Yes.

Q. And that finding, also, Doctor, would be inconsistent with the finding of alopecia areata?

A. The finding of scaling?

Q. Yes? A. Yes.

Q. One question on the finding of atrophy. When we speak of atrophy, for instance, in a more general field which we, as laymen, are acquainted with, for instance of a muscle or a nerve, do we or not mean the physical shrinking up and nonusability of that muscle or nerve? A. Yes.

Q. I suppose that atrophy in the term that you have used it is the same thing? A. Yes.

Mr. Lanier: That is all. [9]

Mr. Lanier:

Recross Examination

Q. (By Mr. Jungroth): Doctor, I believe that you stated to me that you would not approve of the use of the selsium if there was chemical damage to the hair and scalp. Is that correct?

Mr. Lanier: That was objected to, your Honor, as a misstatement of testimony, which it is, but I withdraw that objection because of the answer.

A. I would not use selsium if there was a dermatitis of the scalp—dermatitis or burning of the scalp.

Q. And this condition of the patient could have

(Deposition of Dr. Frank M. Melton.)

been caused by an allergy, could it not?

A. I don't think so. This would not be the usual allergic type of reaction, because there was no other symptom of an allergy. Loss of hair could accompany an allergic reaction.

Q. But allergies are strange things that no one completely understands?

A. That is right, but there are certain symptoms and signs of an allergy that you make the diagnosis on, and there was no history of erythema, which is redness, no history of any vesicles or blisters, following [10] the application of the permanent.

Q. And, of course, the history was what you were informed by others?

A. The patient and the mother, that is right.

Mr. Jungroth. That is all.

Redirect Examination

Q. (By Mr. Lanier): From your own findings, both subjective—which is what has been told you—and your own objective findings, or pathological finding, and every other physical finding that you made, was there any indication from all of these findings of any allergy? A. No.

Mr. Lanier: That is all.

Mr. Jungroth: That is all.

Mr. Lanier: At this time, may it please the Court, I would like to call to the stand Dr. Harry Levitt. [11]

DR. HARRY LEVITT

called as a witness on behalf of the plaintiff, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct Examination

Q. (By Mr. Lanier): Would you state your full name, please, Doctor? A. Harry Levitt.

Q. And where do you live, Dr. Levitt?

A. In Los Angeles.

Q. And what is your profession?

A. I'm an M.D.—Dermatologist.

Q. Now by an "M.D.", you mean, of course, that you are a doctor of medicine? A. Yes.

Q. And by dermatologist you mean that you have a special field of dermatology? A. Yes.

The Court: How do you spell your name, Doctor?

The Witness: L-e-v-i-t-t.

The Court: Thank you.

Q. (By Mr. Lanier, resuming): Where did you receive your [12] medical training, doctor?

A. I went to medical school at the University of California in San Francisco, and I took my internship and residency in Los Angeles County General Hospital.

Q. And what year did you graduate from medical school? A. In 1941.

Q. What year did you finish your residency?

A. In 1949.

Q. And between the years of 1941 and '49,—

(Testimony of Dr. Harry Levitt.)

let's go back to '41 first, Doctor. Upon completing and getting your medical degree, what did you do?

A. I took my internship.

Q. Where did you take your internship?

A. Los Angeles County Hospital.

Q. And when did you finish that?

A. I finished that in August of 1941.

Q. Following the completion of your internship, where did you go? A. I went to the Army.

Q. United States Army? A. Yes, sir.

Q. In the Army, where were you stationed?

A. I was stationed in the Philippines, when the War started.

Q. At the outbreak of the War?

A. Yes, sir. [13]

Q. Were you practicing medicine with the Army? A. Yes, sir, I was.

Q. You were a doctor with the United States Army at that time? A. I was.

Q. Were you not taken prisoner?

A. I was.

Q. And for the three years that you were in prison, did you or not—in a Japanese prison camp—did you or not, continue your practice of medicine?

A. I practiced medicine most of the time.

Q. As a prisoner? A. Yes.

Q. Upon American prisoners?

A. On American, occasionally Japanese civilians.

Q. Now, when did you return to the United States, Doctor? A. In 1946.

(Testimony of Dr. Harry Levitt.)

Q. And did you again take up your practice of medicine?

A. I went to the hospital at that time for further training.

Q. Further training in what field?

A. Dermatology.

Q. Where did you take this training?

A. At Los Angeles County General Hospital and University of Southern California. [14]

Q. How long did that training take, Doctor?

A. Three years.

Q. When did you complete it?

A. In 1949.

Q. And did you then become a specialist as a dermatologist?

A. Yes, I became a Diplomate of the American Board of Dermatology.

Q. And would you state what that entails and what you now hold in it, doctor, what it means to the laymen on the jury?

A. Well, it's an examination to license you, or at least establish a proficiency in a particular type of speciality.

Q. And is that today your only type of medicine that you practice? A. That is right.

Q. Dermatology? A. Yes, sir.

Q. Where is your office located, doctor?

A. At 5221 Wilshire Boulevard.

Q. How long have you practiced dermatology in the city of Los Angeles or this area?

A. Since 1946.

(Testimony of Dr. Harry Levitt.)

Q. Which would be approximately twelve years?

A. Twelve years. [15]

Q. Doctor, have you had occasion this week, to have examined one Sandra Mae Nihill?

A. Yes, I did.

Q. And was that examination made at my request? A. Yes, sir, it was.

Q. From that examination, doctor, did you also receive from her and her mother her entire case history? A. Yes, I did.

Q. Did you or not also read the depositions of Dr. Martin and Dr. Melton, her attending physicians? A. I did.

Q. So that you are familiar with the case history and background as given by those two doctors?

A. Yes, I am.

Q. And did you also read the deposition of Dr. Michelson of Minneapolis, taken by the defendant?

A. Yes, I did.

Q. So that you are generally, at least, familiar also with that deposition? A. Yes.

Q. And whatever case history background it includes? A. Yes.

Q. Now then, doctor, would you state for the jury what your personal findings of Sandra Mae Nihill at this time were, from your own examination? [16]

A. Well, at this time, I felt that she was a well-developed and nourished girl. The scalp of her hair was short, sparse, some of it varied in texture and color. The hair did not break easily and it

(Testimony of Dr. Harry Levitt.)

was well fixed in the scalp. There was moderate scaling of the scalp. The eyebrows and lashes were partially gone. The axillae were shaved and there were—the hair of the pubic area was sparse with areas of almost complete alopecia, almost complete lack of hair. Examination of the female genitalia revealed perfectly normal genitalia. There was a scaling eruption of both inner thighs——

Mr. Lanier: One moment, Doctor.

(Counsel conferred with the plaintiff, and she left the court-room.)

Q. (By Mr. Lanier, resuming): Now, doctor, in the examination of Sandra Nihill, based upon your own examination of her and based upon your own education and experience as a doctor, and based upon her case history, could you tell me whether or not you reached any conclusion as to what her present condition is? A. Yes.

Q. Would you say what conclusion you reached?

A. I believe that she has alopecia areata. [17]

Q. And that is your now diagnosis?

A. Yes.

Q. Now, because there has been so much testimony on alopecia areata, doctor, would you tell the jury in as close to our terms as possible, what alopecia areata is?

A. Well, alopecia areata is a loss of hair, usually very sudden, which may be from a very small area to an almost complete loss of hair. Usually it's unattended by any changes except the sudden loss

(Testimony of Dr. Harry Levitt.)

of hair. That is, there is no redness or scaling or itching, the hair just falls out.

Q. All right, now that is a description of alopecia areata. Is that correct?

A. That is correct.

Q. Now, doctor, will you tell me whether or not, based upon your education, experience and training, and based upon the case history of this girl as given to you, and based upon your own examination, will you tell me whether or not you have an opinion based upon reasonable medical certainty, as to whether the original hair loss to this girl could be caused by a chemical? Yes or No, Doctor?

A. Yes.

Q. Would you state that opinion, please? [18]

Mr. Packard: Well, I object to the question upon the ground there's no proper foundation laid and this has no probative force, as to a chemical—I mean it's irrelevant and incompetent.

The Court: Of course that probably is involved in the case history.

Mr. Lanier: It's all involved in the case history, your Honor, and it's also involved in the testimony which is now in this record which the doctor testifies that he has read.

Mr. Bradish: Your Honor, before I make an objection, may I inquire on voir dire of this witness?

The Court: Yes, you may.

Questions by Mr. Bradish:

Q. Doctor, were you given a history that this

(Testimony of Dr. Harry Levitt.)

young lady had had a chemical applied to her hair?

A. That she applied a cold wave permanent.

Q. You don't have any history that a chemical was applied?

A. Well, a cold wave permanent consists of a chemical.

Q. Well that's your opinion. Do you have a history, sir, that there was a chemical applied to this girl's hair [19] at any time?

A. Well it depends on the definition of "chemical". Water itself is a chemical. Something was applied to the hair.

Mr. Bradish: Well, I'm going to have to object to the question on the ground it assumes facts not in evidence, unless we have some identification of the chemical, because the doctor, by his own testimony, admits that even water is a chemical.

Mr. Packard: It's immaterial too.

Mr. Bradish: (Continuing) Until we tie down the chemical, your Honor, I don't think this doctor can give an opinion.

The Court: Overruled. You may answer.

The Witness: I may answer?

The Court: Yes, you may answer.

A. Yes.

Q. Your answer was "yes", doctor. Now will you give your opinion?

A. Now I've lost track of what you were asking, in the [20] meantime.

Q. I asked you, doctor, with all the other foundation in it, so I don't have to repeat it all, whether

(Testimony of Dr. Harry Levitt.)

or not, based upon reasonable medical certainty, you have an opinion as to whether the original loss of hair to this girl could have been caused by a chemical? A. Yes, sir.

Mr. Packard: Object—too speculative.

Q. State that opinion, doctor.

Mr. Packard: It "could have been caused" is too speculative. It isn't within reasonable medical certainty.

The Court: I understood the original question contained the element of reasonable medical certainty.

Mr. Packard: Yes, but he reframed the original question.

The Court: I believe he did that.

Mr. Lanier: I'll ask the question all over again, your Honor.

Q. (By Mr. Lanier, continuing): Doctor, based upon your experience and your education as a doctor; based upon the case history of this girl with which you [21] have become acquainted; based upon the case history as given by the two attending physicians, and based upon your personal observation and examination of this girl, do you have an opinion, based upon reasonable medical certainty as to whether or not the original hair damage was caused by a chemical? To which you answered "yes." Now would you give that opinion please, doctor?

Mr. Packard: We have the same objection.

The Court: The same objection is noted on be-

(Testimony of Dr. Harry Levitt.)

half of each of the counsel, for the defendants, and the doctor may answer the question.

A. I believe that a cold wave permanent could have caused the original loss of hair.

Mr. Packard: I move to strike the answer on the basis that the answer shows that it's merely speculation and conjecture. "I believe it could have caused." We're dealing within reasonable medical certainties here, and "I believe it could have caused" is dealing in speculation and conjecture, which I believe your Honor will instruct the jury they shall not consider.

The Court: I don't think so; the answer may stand. [22]

Q. (By Mr. Lanier, continuing): Now, doctor, in your experience, in the light of your practice—even here in this area—have you or not had many cases in your office of damage to hair and scalp by home wave solution? A. I have.

Q. So that that in itself is not unusual?

A. That's right.

Q. Now, doctor, I believe also at one time that you wrote a paper and submitted it to what organization was that, doctor?

A. Journal of Investigative Dermatology.

Q. And that subject, I believe covered the absorption of chemicals into the skin, did it not?

A. Of one particular chemical.

Q. And will you state whether or not chemicals can be absorbed into the skin?

A. They can be.

Q. Now, doctor, when a young girl of thirteen

(Testimony of Dr. Harry Levitt.)

years of age, suddenly loses all of her hair, will you tell me whether or not, medically, that is subject to creating a shock within that girl's system?

Mr. Bradish: Just a minute. That's objected to as being outside the scope of this doctor's qualifications. He is [23] qualified as a dermatologist, which deals with skin disorders, and I think this question calls for the testimony of somebody in the field of psychiatry.

Mr. Lanier: If the Court please, this doctor has testified that he has handled this type of loss of hair patient, he's a doctor, he's a medical man, he's qualified to testify upon the reactions to patients of this general category without being a psychiatrist.

The Court: You may answer it.

A. I believe it could cause an emotional shock.

Q. And from your examination of this particular girl, doctor, do you have an opinion based upon reasonable medical certainty as to whether or not it did cause an emotional shock to this girl?

A. I think it did.

Q. Now, doctor, will you tell me and this jury one of the principal known causes of alopecia areata?

A. Emotional tension is one of the causes of alopecia areata.

Q. Is there any other cause that's very well known of, doctor?

A. Otherwise the causes are unknown.

Q. And emotional shock is the only known cause? [24] A. That is correct.

(Testimony of Dr. Harry Levitt.)

Q. Doctor, are you acquainted with the Abbotts' Laboratory preparation of selsam?

A. It's selsum. (Spelling) s-e-l-s-u-m.

Q. We've got it spelled about six ways in six different depositions. S-e-l-s-u-m—are you acquainted with it, doctor? A. I am.

Q. What is its use?

A. It's used in seborrheic dermatitis. The simple name for it is dandruff.

Q. And is a normal application for scaling of the scalp? A. It is.

Q. Are there any known cases in medical annals, doctor, of selsum causing loss of hair?

A. About two years ago, there was a report on a few cases, but apparently it was never authenticated.

Q. Any within your experience? A. No.

Q. Does dermatology accept selsum as any possible cause of loss of hair? A. No.

Q. Is it or not an accepted treatment for scalp scaling? A. It is. [25]

Q. Doctor, will you explain to the jury what is meant by the term, which has been used several times here, "seborrheic dermatitis"?

A. Seborrheic dermatitis is dandruff, and of course the commonest symptom of dandruff is just simple scaling, and it can be from simple scaling to very severe irritation and inflammation with scaling.

Q. Is it ever accompanied by rapid loss of hair?

A. No.

(Testimony of Dr. Harry Levitt.)

Q. Doctor, from your examination of this girl and from her case history and from the depositions of the attending physicians, is there anything to indicate any allergy of any kind? A. No.

Q. Now, doctor, based upon your training, education and experience; based upon the case history that you've gotten from this girl; based upon the depositions of attending physicians which you have read; based upon your own personal observations and findings, at this time, over three years after the original loss of hair, do you have an opinion based upon reasonable medical certainty as to whether or not that hair loss is permanent? A. Yes.

Q. Will you state that opinion? [26]

A. Regrowth of hair would be unlikely.

Q. At this time? A. At this time.

Mr. Lanier: Your witness.

Cross Examination

Q. (By Mr. Packard): Doctor, I would like to take a look at your records, please. (The witness furnished counsel with his records.) What's this word here? A. "No shampoo."

Q. What does this say "neutralizer, no shampoo"?

A. Yes. It's my own abbreviation. I said, "Mother and friend applied cold wave permanent, followed instructions." That is they followed the instructions as given. Neutralizer was used, no shampoo followed.

Q. Why don't you just read—I can't read your

(Testimony of Dr. Harry Levitt.)

writing, doctor. Why don't you just read this history there?

A. Do you want me to begin at the beginning?

Q. Well, no. Right where you left off here, "Dry and——

A. (Reading): "Dry and one week later hair began to fall. No pain. Did not seem to break, only fall out to almost complete loss, and scattered * * *. Eyebrows also came out. No symptoms, little regrowth. Basal metabolism is o.k. General health is good. Blood and urine apparently normal." There was a question of a blood iodine test. I couldn't decide, from the history, if they did or did not take a blood iodine test.

Q. Just a moment. This history is what you gathered from reading the depositions——

A. No. This is from questioning the patient and from reading the depositions.

Q. I was wondering about the iodine test.

A. I asked the patient if they had a blood iodine test. (Witness continues reading from his record.) "Menarche at the age of 12." That is she started to menstruate at the age of 12, "was regular, periods lasted eight days, she has a normal flow, she has no pain with her periods. There's no family history of eczema, hay-fever or asthma; no family history of hair loss. The mother, at the age of forty-five, has two sisters, one thirty-one and twenty-nine, three uncles and three aunts on the father's side with apparently normal hair, and the mother, all the hair is all right. There's no known tension and the pa-

(Testimony of Dr. Harry Levitt.)

tient stated that she had little reaction to the fall of hair. She has two—— [28]

Q. Well, now "little reaction to the fall of hair," what do you mean?

A. I asked her how upset she was when her hair fell out and she said that it didn't bother her.

Q. Well now, doctor, with that history, if she had no reaction to her hair falling out and it didn't bother her, do you feel still in your testimony that an emotional shock would be the cause of alopecia areata in this case when there are many unknown causes?

A. Not many. The principal cause is thought to be emotional tension.

Q. Now you say is "thought to be emotional tension," but that's one of them and, actually, as far as dermatology is concerned in the medical profession, the etiology is really unknown. It's known that certain things cause it and one of them may be nervous tension, upset, emotional and so forth. The——

A. Most dermatologists, at the present time, believe emotional tension is the most important factor in alopecia areata.

Q. Now, emotional tension, such as emotional tension of a girl playing in a basketball tournament, becoming excited and tense over school activities, is emotional tension, isn't it?

A. Well they feel that twenty-five percent of alopecia [29] areata is due to sudden emotional shock. At one time we thought that all alopecia areata was due to a sudden emotional shock. At the present

(Testimony of Dr. Harry Levitt.)

time we feel that about twenty-five percent is due to —for example, there are cases where a patient would find out that he had cancer and over-night lose all of his hair. There's many proven cases like that.

Q. And there's many causes that are unknown, isn't that correct? Without any history of any shock or anything, people's hair just starts falling out, yet no shock, no mental disturbance, or anything, and they have alopecia areata?

A. That is correct.

Q. And then it can go from alopecia areata to alopecia totalis to alopecia universalis—correct?

A. Correct.

Q. By that we mean it goes from, "areata," means an area. "Totalis" means a total hair, say in the scalp. "Universalis" would be the pubic hair, the hair of the body and just all over?

A. Correct.

Q. And that could be brought about by things other than shock, or emotional upset?

A. I wouldn't agree with that.

Q. Now, is it your testimony at this time, that the only [30] cause of alopecia areata is shock?

A. The major cause.

Q. But there are other causes, isn't that correct?

A. I said that we don't know about, that we can't prove one way or the other.

Q. I'm not asking you to tell me about the causes you don't know about.

Mr. Lanier: Your Honor, his testimony has been very clearly that the other causes are unknown.

(Testimony of Dr. Harry Levitt.)

Mr. Packard: This is cross examination.

Mr. Lanier: Well it may be.

The Court: I think he has not exceeded his rights on cross examination, Mr. Lanier. Proceed.

Q. (By Mr. Packard, resuming): Now, isn't it a fact, doctor, that a shock or excitement or nervous tension over a girl playing in a tournament, basketball, can cause certain tensions, mental strain, anxiety, which could cause this condition?

A. Possible.

Q. It's one of the causes, isn't that correct?

A. That's correct. [31]

Q. All right. Finish reading your entire record.

A. (Reading): She has three brothers, two older and one younger, and she says that she gets along well with here * * *. She said that she did well at school. Her past history was that she had measles and chicken pox and had never had scarlet fever. And then I read the physical examination before.

Q. Well, first of all you have "obese"——

A. Obese, that means she is somewhat overweight. And the other thing I left out, with the girl sitting here, that her right labia minora was larger than the left which I do not consider significant, and her clitoria was perfectly normal, which I do consider significant because, in some endocrinological disturbances——

Q. Well, now you're going a little too fast for me, doctor, and I'm sure you're probably going a little fast for some of the members of the jury, so since we've got time, let's take these step-by-step, so

(Testimony of Dr. Harry Levitt.)

you go ahead and read right from your record what your physical findings are and when you come to those medical terms, please give us the benefit, if you can, to interpret them into lay terms so we'll all understand you, doctor. [32]

Mr. Bradish: And would you be kind enough to spell the words for our good reporter because she is not a doctor.

A. (Continuing) The patient was over-weight; she was not demonstrative, that is, she was placid when I was questioning her. Her scalp hair was short, sparse and varied in color and texture. The hair did not break easily; the hair was well fixed in the scalp, and there was moderate scaling of the scalp. The eyebrows and eye-lashes were partially gone. The hair of her arm pits had been shaved and I was unable to make any definite idea of how much hair there was there. The hair of her pubic area—that is of the area between the legs—was short, in varied size, and there were plaques, that is areas of almost complete loss of hair. The right labia, that is in the vaginal area, about the vagina, one lip was larger than the other, which I did not think was significant. Her clitoris—and the clitoris is a small structure in the female which is, in development, what in the male develops into the penis—in her case was normal. The reason we examine that is if the gland is not working properly, for example, if she were having too much male gland, that would enlarge, and that could be involved in hair loss sometimes, and this was normal [33] in

(Testimony of Dr. Harry Levitt.)

this case. Then there was a red, bumpy area of both inner thighs. I don't have it on the record, but I did a Woods Light examination; I looked at her with a particular type of light which shows up ringworm, and that was negative, and I also took out several hairs and looked at them under the microscope and could find no evidence of fungus infection.

Q. Now, doctor, would you go to the board, and if you could, show a hair. Now when I say that, I have reference to the papilla——

A. You mean the hair in the scalp?

Q. Yes, and if you could, make it rather large. When I say that, doctor, make it where it comes down where the bud will be down in here some place (indicating).

(The witness left the witness stand and went to a blackboard in the court-room and by the use of green and red pencils sketched and demonstrated.)

Q. Now, maybe if I'd tell you what I would like for you to put in there—I see you have the gland in there. And you have the epidermis?

A. (Demonstrating) This is the epidermis up here.

Q. And the follicle is the——

A. This is the "dermis", and that's the hair, this is the papilla, and these are blood vessels which feed the roots. [34]

Q. And you have subcutaneous tissue below that, is that correct?

(Testimony of Dr. Harry Levitt.)

A. Well the dermis extends down—and this is subcutaneous tissue down here.

Q. Now the hair bulb is right down there by——

A. The papilla is the bulb. Do you want me to label that "bulb"? Papilla and bulb are synonymous.

Q. I believe that takes care of it. I'd like, your Honor, to have that marked Defendant's—I guess it would be "A"?

The Court: It will be so marked.

(Thereupon, the sketch was marked Defendant's Exhibit A for identification.)

Q. Now, doctor, what is the average life of a hair?

A. Oh, hair lives for a relatively long period, as you can tell because hair gets so long.

Q. Isn't it about two to four years?

A. Probably around four years.

Q. And so what happened then is when a hair gets to be about four years old they will come out—the papilla there—and a new one will start in the same area? A. In the same area. [35]

Q. Is that correct? A. That is correct.

Q. And, generally speaking, hair grows about, how much does it grow, you tell me?

A. It varies with the individual, but you can figure that hair will grow about as long as a fingernail in about four months.

Q. Now, where does the blood supply—first of all, there is no nerve or feeling in the hair, is there? A. Hair is a dead structure.

(Testimony of Dr. Harry Levitt.)

Q. And the only life to the hair comes down here at the bulb of the papilla, isn't that——

A. Well the papilla, of course, is living tissue.

Q. Yes, but I mean that isn't part of the hair?

A. The living part of the hair is down here in the bulb.

Q. When you say—down here in the follicle, this is all living tissue, but the red part here is dead, all the red part is dead tissue all the way up and, of course, there would be no feeling or no nerves or sensation in that, all of the red part? A. None.

Q. And the only life comes from the bulb itself which is fed through the blood vessels in the subcutaneous area below it?

A. That is correct. [36]

Q. Now what, generally speaking — has there such a measurement ever been made in the medical profession to determine the space between the average hair coming out of the scalp and the hair itself?

A. You mean the space in here (indicating)?

Q. Yes. A. Oh, it's very small.

Q. Would you say that practically none existed, isn't that correct?

A. No, because for electrolysis, it is possible to put a fine needle down into here (indicating). That's how we destroy hair with electrolysis, without entering the——

Q. But, for electrolysis, if you want to kill hair or deaden hair, you have to get down to the bulb there and kill the bulb?

A. We are able to insert a needle right along the side of the hair into here (indicating).

(Testimony of Dr. Harry Levitt.)

Q. And by doing that, that will deaden the bulb and the hair will come out and that's the end of that particular hair in that area? A. Right.

Q. Now, doctor, in connection with the — you may resume the stand there, doctor, thank you. (The witness resumed the witness stand.) In connection—you [37] stated you read the depositions of Dr. Martin, Melton and Michelson?

A. Yes, I did.

Q. And do you recall that it was on February 28th that Miss Nihill—Sandra—saw Dr. Martin and he diagnosed the condition as seborrheic dermatitis?

A. That is right.

Q. And you, through reading his deposition, and the history, that was the diagnosis he made of the condition existing at that time?

A. That is correct.

Q. And, according to his history, there is no evidence whatsoever of any chemical burns, was there?

A. That is correct.

Q. And there wasn't any history in anybody's deposition that there was any chemical burn?

A. No.

Q. And will you please explain what evidence you would expect to find from a chemical burn?

A. Well chemical burn would be just like, depending on the severity. A mild chemical burn would resemble a sunburn; a severe chemical burn would more resemble something like a piece of grease that had dropped on the hand or perhaps a hot iron to the hand, and——

Q. And you have experienced in your practice

(Testimony of Dr. Harry Levitt.)

[38] of dermatology—I don't know whether it's been asked, probably all the jurors understand——

A. Diseases of the skin?

Q. Yes, I wasn't sure whether that had been brought out. You have experienced in your practice in the field of dermatology many cases wherein people had sustained damages by various applications of solutions, tints, dies, cold wave cream, all sorts of cosmetics to their hair, is that correct?

A. Yes.

Q. And it doesn't matter what type of particular cosmetic—you've seen them from bleaches, you've seen them from tints, and you've seen them from cold waves and various solutions, is that correct?

A. That is correct.

Q. And in those cases, you have also had occasion to see people that had injury to their scalp from a chemical reaction to the scalp, is that correct? A. That is correct.

Q. But in this case, there is no indication of any chemical reaction to the scalp of Sandra, isn't that correct? A. That is correct.

Q. Now in these cases wherein these people had sustained damage to their hair, in your experience their hair [39] would break off and then would grow out at a normal rate, isn't that correct?

A. That is correct.

Q. And that occurred in all the cases you have seen where that type of damage has been sustained?

A. All but one.

Q. And this is the one?

(Testimony of Dr. Harry Levitt.)

A. No. I'm not referring to this one. We're forgetting about this one.

Q. But in any event, that's the normal thing you would expect, isn't that correct?

A. That is correct.

Q. And that is true even so far as chemical burning to the scalp is concerned, you would not expect damage to the bud itself, but you would expect the burning to the scalp, maybe take the hair right down to the scalp and then you would expect the hair to re-grow?

A. Except where the burn would be severe enough to destroy subcutaneous tissue.

Q. But you don't see those in hair tints or——

A. No.

Q. I mean, we're talking about a strong acid dropped on someone's head, or from working in a chemical works or something, where you have a real strong chemical burn? [40]

A. Ordinary cosmetic preparations would never do that.

Q. In other words, would never damage the subcutaneous areas? A. That is correct.

Q. And as a matter of fact, in your practice, you've never seen any subcutaneous area damaged by the use of cosmetics, have you?

A. That is correct.

Q. When you say it's correct—you mean my statement? A. Your statement is correct.

Q. Now, you will recall that Dr. Michelson, I

(Testimony of Dr. Harry Levitt.)

believe, and he is recognized as one of the leading dermatologists in this country, isn't he?

A. Yes.

Q. And he examined Sandra, I believe in Minneapolis, in March as I recall, in 1956?

A. About a year ago.

Q. And Dr. Michelson stated, I believe, that the scalp was impervious to solution. What does he mean by that? A. I'm not sure.

Q. Well, what does the word "impervious" mean?

A. That no solution could go through.

Q. When he says that the scalp is impervious to solution, he means that the solution can not go down below the [41] scalp or the hair. That was his opinion, wasn't it?

A. I think he meant that it could not be absorbed by the body through the scalp.

Q. Now, going back to the first treatment, the seborrheic dermatitis which was diagnosed by Dr. Martin, was a condition in which he prescribed selsum, and that was a prescription given for the purpose of probably curing this dandruff—we call it dandruff, is that correct? A. Yes.

Q. What causes seborrheic dermatitis?

A. Seborrhea has a number of causative factors. Dietary factors play a part, hereditary factors play a part, glandular factors play a part—and emotional factors play a part.

The Court: Would you have the doctor define seborrheic dermatitis again please? I think he did.

(Testimony of Dr. Harry Levitt.)

A. Seborrheic dermatitis is what is commonly known as dandruff. It may vary from slight scaley to severe redness and scaley, and it may involve not only the scalp, but other portions of the body.

Q. Now you had cases where you quite often find seborrheic dermatitis in teen-agers, don't you? [42] You see some of them that have lesions or acne because of the sweat gland—the oils pouring out, is that correct?

A. Well, actually, it's faulty action of the fat glands.

Q. Faulty action of the fat glands will cause this deposit on the scalp, which is referred to as seborrheic dermatitis, that's one of the causes, isn't it?

A. Yes.

Q. And then also a cause can be a systemic condition—and when I say "systemic condition," that refers to the condition within a person's body, their own chemical make-up, and composition. Is that correct, sir?

A. The glands and the diet.

Q. And one of the glands which has effect upon this is the thyroid. Is that correct?

A. That is correct.

Q. Now do you recall, Dr. Levitt, that Dr. Melton prescribed thyroid to this young lady when he examined her in the summer of 1955, did you get that history? A. Yes.

Q. Now, the purpose of prescribing thyroid, and that is a thyroid substance, isn't it, that's the name of it, thyroid substance to supplant the thyroid

(Testimony of Dr. Harry Levitt.)

gland, is that correct? A. That's correct. [43]

Q. And that, I take it, is to stabilize the metabolism within the body? A. Reasonable.

Q. And you take a thyroid condition, and you've seen people suffering from thyroid conditions, haven't you? A. Yes, I have.

Q. Will you please state to the jury some of the outward manifestations that you would ordinarily expect to find in a person suffering from a thyroid condition?

A. You mean not enough or too much thyroid?

Q. Well, if we're taking pills we haven't got enough, is that correct? A. That's right.

Q. O. K.

A. There is usually an increase in weight; the patient may become lethargic, the skin becomes thickened and dry, the hair becomes thickened and dry and there may be a certain amount of hair loss with a severe lack of thyroid function.

Q. Now actually, doctor, that's just about a classic picture of what you have here of Sandra, isn't it? She's over-weight, her hair is falling; that she has a drying of the skin, and when I say a drying of the skin, you did find it drying in her thighs, isn't that correct? [44]

A. Well that was because she is rather obese——

Mr. Lanier: One moment, if the Court please. Now this question is objected to, if the Court please, because it's completely outside the testimony, because the record conclusively shows that the first thyroid——

Mr. Packard: Well, now——

(Testimony of Dr. Harry Levitt.)

Mr. Lanier: Wait a minute, counsel.

Mr. Packard: This is cross examination.

The Court: Let him finish.

Mr. Lanier: He is misquoting testimony, your Honor, because it clearly shows that the first thyroid that was ever given to Sandra was given thirteen months after the application when she was already totally bald.

The Court: All right. You can bring that out on your redirect. Proceed.

Mr. Packard: All right. Will you please read my question back?

The Reporter: (Reading question) "Now actually, doctor, that's just about a classic [45] picture of what you have here of Sandra, isn't it? She's overweight, her hair is falling; that she has a drying of the skin, and when I say a drying of the skin, you did find it drying in her thighs, isn't that correct?"

Mr. Packard: Would you go back please and read the answer that Dr. Levitt gave to my question? The one before that? I lost my train of thought.

The Court: The reporter will require a little time. The Court will recess and the jury will retire for ten minutes. Be back please and ready to proceed.

(Whereupon, a ten minute recess was taken, and thereafter occurred the following proceedings in open Court:)

Q. (Mr. Packard resuming cross examination of

(Testimony of Dr. Harry Levitt.)

Dr. Levitt): Now Dr. Levitt, did you observe that Sandra's skin was dry in the elbow area and various portions of her body had dry skin?

A. Somewhat dry.

Q. And also this area in the scalp there would be some dryness, is that correct?

A. That is correct.

Q. Well it can be either from a dryness or an over-supply [46] of the subcutaneous gland, isn't that correct? Do you follow me, doctor? Well, maybe I'm—well when you have dandruff or seborrhea, it results from the pouring forth of the oil from the subcutaneous gland, which you put here on the board. Is that a correct statement?

A. Not entirely; sometimes either faulty fat being deposited or not enough oil being expressed either, it could be either one that could produce a dryness.

Q. Well, anyway, it's a scaley formation on the scalp, is that correct? A. That's correct.

Q. And that, generally, is referred to as a dry condition, is that correct, generally speaking?

A. We usually call it dandruff.

Q. I want to go back now. You stated that with a thyroid deficiency, you usually find an increase in weight. Now you did find an increase in weight here?

A. An increase of weight is usually a particular type with a so-called myxedema, in which you get a particular type of swelling, particularly to the legs and of the face, with an unpitting edema, that

(Testimony of Dr. Harry Levitt.)

is you poke your finger in it and it doesn't depress, and she did not have that type of weight. [47]

Q. But she was obese? A. She was obese.

Q. Did you take a history as to her weight, say over a period of years to determine when this increase had occurred?

A. I don't believe I did.

Q. And one of the symptoms you expect to find in a thyroid deficiency is that the skin becomes thick and dry? A. Among other symptoms.

Q. And that the hair becomes thick and dry?

A. The hair usually becomes lighter in texture rather than heavier in texture, and usually becomes sparse, of a particular type of loss.

Q. When I say hair becomes thick, maybe we misunderstood each other, I am talking about the hair shaft itself. Do you follow what I mean?

A. The hair shaft will frequently become thinner in thyroid disease.

Q. And the hair shaft can vary in size, isn't that correct? A. That is correct.

Q. That's the way these various home wave solutions work upon the hair shaft, is that they take and soften it where it gets larger and then they put some substance [48] on it—neutralizer——

A. They reduce the chemical linkage.

Q. That's what I mean, in the hair shaft itself. All right now, in the thyroid deficiency you would expect to find a loss of hair too, quite often, that's one of the symptoms?

A. In severe thyroid diseases.

(Testimony of Dr. Harry Levitt.)

Q. Well, now there are various—you can have a thyroid deficiency without having all of the findings you would expect to find in certain thyroid conditions?

A. They usually follow in certain order. For example, the menstrual period usually ceases before you get much else.

Q. Well now I took your answer from the reporter, when I asked you what you would expect to find in the usual thyroid deficiency, and in the order you gave, and your answer was "Usually an increase in weight; the patient may become lethargic, the skin becomes thickened and dry, the hair becomes thickened and dry and there may be a certain amount of hair loss with a severe lack of thyroid function." That was your answer. Now isn't it a fact, doctor, that those symptoms are symptoms which were present in Sandra's condition?

A. Not of the type that you get with hypo [49] thyroid diseases.

Q. But you did find from the history that you took, and from the information you obtained in connection with this condition which she was suffering from, that Dr. Melton had prescribed thyroid? A. That is correct.

Q. That's correct. And with the symptoms present here, according to good medical practice and standards, the prescribing of thyroid was indicated?

A. Thyroid we use empirically, that is for no good reason, in almost any hair loss when we treat it.

(Testimony of Dr. Harry Levitt.)

Q. Is it your testimony Dr. Melton used it for no reason?

A. No, I believe that he thought that it might be of some benefit.

Q. And isn't it a fact that it might have been of some benefit, with the falling of hair, the dryness of the skin, the increase in weight, and so forth, that that was one of the things the attending physician was bound to consider and rule out before he went to something else? Isn't that correct?

A. Well, as a matter of fact, as I told you when we read the history, when I talked to the girl I couldn't get a history of a blood iodine test or a basil metabolism test, but after the mother came into the room I discussed that with her and a blood iodine had [50] been done and apparently was normal. I did ask that question.

Q. All right, now let's go back, did you find out about a basil metabolism?

A. A blood iodine test and a basil metabolism test give you the same information.

Q. What did you find out about the——

A. They were normal.

Q. And you received that information from the mother?

A. From the mother when I saw her on the day she was in the office.

Q. Now, wasn't there a metabolism test run by Dr. Melton? He said the laboratory studies were normal. Is that where you read that?

A. That's right.

(Testimony of Dr. Harry Levitt.)

Mr. Lanier: Page 6 counsel, the fourth line. "Radioactive iodine test was normal."

The Witness: That is a test that gives you more accurate information than the actual basil metabolism test.

Q. (Mr. Packard, resuming): But he did prescribe thyroid after obtaining those laboratory reports—— A. Yes.

Q. And from his opinion at that time, it was indicated, as far as you know? [51]

A. But using an entirely different dosage of thyroid if you were treating something like hyperthyroidism.

Q. All right. Now, doctor, I believe you stated in your direct examination, that the plaintiff was suffering, in your opinion, from alopecia areata. Was that your testimony?

A. That is my testimony.

Q. Now, alopecia areata, isn't that the loss of hair in patches or spots?

A. It may vary from a tiny one-half inch patch to complete loss.

Q. Now did you find—where did you find these patches on Sandra's head?

A. Her scalp has no patchiness. Her scalp has little patchiness anyway.

Q. Well, generally speaking doctor, her scalp doesn't have patches of loss of hair, does it?

A. She has the type of hair loss consistent with partially regrowing alopecia areata.

Q. Now when you say "alopecia areata," you're

(Testimony of Dr. Harry Levitt.)

really basing your testimony more upon the picture than what you saw in your office. Isn't that correct, doctor? A. No, sir.

Q. Of course, the patches in the pubic area would indicate alocepia areata? [52]

A. And the eyebrows and the eye lashes.

Q. I see. And you read in the history of these doctors, that there's a complete loss of the eye lashes. You read that, is that correct?

A. That is correct.

Q. And the eye lashes though have grown?

A. Slightly. There is some regrowth.

Q. How about the eyebrows?

A. A slight amount of regrowth.

Q. But, generally speaking, when you refer to medical profession's alopecia areata, you see people with their hair with spots here and here and here (indicating), with a full normal growth of hair, and then you can see right down smooth on the scalp, that's the classic case of alopecia areata, isn't it? Is that correct?

A. That is the text book picture.

Q. Well, that's right; I looked at the text book. You're familiar with Sutton, aren't you?

A. I am.

Q. It's one of the leading authorities on dermatology. Is that correct? A. He is one of them.

Q. He is one of the authorities, he's recognized, isn't that correct? A. Yes. [53]

Q. These books all have pictures of alopecia areata in them, and one of the classic pictures they

(Testimony of Dr. Harry Levitt.)

show is someone with a normal full growth of hair and just a bald spot about a diameter of an inch or two inches, now that's the classical picture?

A. That's a classical picture, yes.

Q. But she has hair disbursed all over her head at the present time, isn't that correct?

A. Her's is consistent with the so-called alopecia totalis of the scalp.

Q. Well then is it your testimony she doesn't have alopecia areata, but it's alopecia totalis?

A. Alopecia areata and alopecia totalis are synonymous, only indicating amount of degree and, partially, location.

Q. And it may go into alopecia universalis?

A. They switch back and forth sometimes.

Q. And that was the finding which Dr. Melton arrived at. Is that correct?

A. Yes. I don't believe that Dr. Melton thought it was alopecia areata.

Q. Well he said alopecia of unknown etiology, as I recall. Is that correct?

A. That is correct. I am not even sure that he made that diagnosis. I don't remember the exact diagnosis. [54]

Q. Well, anyway, I am not concerned about that. We have his testimony and I want your opinion, and I think you have stated it, doctor. Now, was this test a protein iodine test?

A. The correct name is "protein-bound iodine test."

(Testimony of Dr. Harry Levitt.)

Q. And that does not rule out the possibility of a thyroid state, does it? A. It does.

Q. Can't you take clinical findings of a girl overweight, as being an indication of thyroid?

A. No.

Q. Now, you read the deposition, I believe you stated, of Dr. Henry Michelson? A. I did.

Q. And do you recall what his diagnosis was?

A. Alopecia areata.

Q. Well if I were to tell you that his diagnosis was fragilitis crinium and seborrheic dermatitis, with another condition that must be considered as alopecia areata, would that refresh your recollection?

A. The other term was mentioned, but I didn't see it discussed particularly.

Q. And the "other term," I'm referring to now, and I believe you're referring to, Doctor——

A. Fragilitis crinium. [55]

Q. Yes. All right, now will you state to the jury what fragilitis crinium is?

A. Fragilitis crinium is a condition in which the hair has become brittle and fragile and tend to separate and split.

Q. And what are the causes of fragilitis crinium?

A. Well the classical fragilitis crinium, theoretically has no cause, but a number of things could produce a similar picture, such as chemical applications of any kind, hair solutions of almost any kind could produce a very similar picture.

(Testimony of Dr. Harry Levitt.)

Q. But you would expect to get a normal regrowth, isn't that correct? A. Yes.

Q. But, when I say "fragilitis crinium"—where it's breaking off—but if it persists over a couple of years, then you would rule out that as being the cause if you were treating, or made a diagnosis of fragilitis crinium. Is that correct?

A. That is correct. Just a moment. As I remember, I just got a picture of the last statement I read there of Dr. Michelson, and towards the end there he does say that he discussed the situation with his associate, and they came to the conclusion that this was alopecia areata. I believe if you will read his testimony [56] toward the end you will find that.

Q. All right. But in any event you have seen cases of fragilitis crinium. Is that correct?

A. Not that I've been convinced is the so-called text book picture.

Q. And the text books do discuss this particular condition as being one of the causes for breaking of the hair. Is that correct?

A. Yes, and most feel that it's probably part of another condition and doubt its very existence as a condition per se.

Q. But it is manifest by the splitting and breaking of the shaft of the hair?

A. That is correct.

Q. And the shaft of the hair is the red part of the hair after it becomes——

A. After it's dead.

(Testimony of Dr. Harry Levitt.)

Q. What? A. After it's dead.

Q. Well it splits and regrows though, doesn't it? From the bud?

A. Well, it keeps growing abnormally and as the hair comes out, it's a hair that is not a normal hair; it's a hair that's a little more brittle than usual and it [57] splits as it grows out.

Q. That's right, but what I'm getting at, assuming for the purpose of this discussion, doctor, that we have a condition of fragilitis crinium—that this red will come out, it will not be a normal, nor break off or drop off, but this blood supply—there's still blood supply, and the bulb is still alive. Isn't that correct? A. Oh yes.

Q. And then you get another one coming up and it's discontinued and the hair just keeps pouring out, isn't that correct? A. That is correct.

Q. Does the medical profession have any particular medication that's prescribed for that condition?

A. None that's probably very effective except that if there is seborrhea present we clear that up and hunt for any possible internal causes, such as anemia or diabetes and clear up those conditions if they are present.

Q. Well, and also a thyroid condition?

A. If that's present, yes.

Q. In other words, a hyperendo—how do you pronounce that?

A. It's an endochrine-hypo function. [58]

Q. And that is a systemic condition within the

(Testimony of Dr. Harry Levitt.)

person's own body, the chemical which causes that condition? A. That is right.

Q. And I take it that, in your practice, that you have seen people, and cases, where people have alopecia areata where, under proper management and treatment, they have a normal regrowth of hair?

A. A lot of mine are not successes. Some do not grow back.

Q. Some of them do not, but when you have someone come into you that has alopecia areata you don't say "well, I'm sorry, we can't get your hair back," but you feel in a good percentage of those cases, you can treat them successfully?

A. I tell them most will grow back.

Q. You think in most cases of alopecia areata that you'll get a regrowth of hair?

A. That is correct.

Q. And that is true of fragilitis crinium, is that correct? A. That is correct.

Q. But when people are suffering from these conditions you undertake to prescribe for them and give them certain treatment which will take care of whatever deficiency, or whatever is causing it—get to the [59] cause and then treat that cause. Is that correct?

A. If there is a cause. The average text books, which discuss the treatment of alopecia areata, state that they do not believe there is any good treatment except referral to a psychiatrist.

Q. Now, the text books though—most of them—

(Testimony of Dr. Harry Levitt.)

feel that you should normally get a regrowth of hair. Isn't that correct?

A. The prognosis varies with the age of the patient and the amount of loss. The younger the patient is and the more loss there is, the poorer the prognosis there is.

Q. But the text books, generally speaking, normally expect you to get a regrowth. Isn't that correct? A. In most cases.

Q. And you do get, in seborrheic dermatitis, loss of hair from seborrheic dermatitis, a certain amount of cases?

A. There's a difference of opinion on that; most of us at the present time feel that seborrhea and hair loss are more coincidental than causative.

Q. Well, you do recognize, in the medical profession, a lot of things occur coincidental. Isn't that correct, doctor? A. That is correct. [60]

Q. And "coincidental" means that it just happens that both things happen at the same time, is that correct? A. That is correct.

Mr. Packard: That's all the questions I have.

Further Cross Examination

The Court: I'll ask counsel please, in accordance with the understanding we had yesterday, you try not to repeat what has been developed by your co-counsel.

Mr. Bradish: I will do my best, your Honor.

The Court: I won't say co-counsel, I'll say associate counsel.

(Testimony of Dr. Harry Levitt.)

Q. (By Mr. Bradish): Doctor, if I understood your testimony correctly, you described alopecia areata as a loss of hair which usually occurs quite suddenly? A. That is correct.

Q. Now, you gave us an opinion here, doctor, that you said a cold wave permanent could have caused the loss of hair in this young girl's case. Is that right? A. Yes. [61]

Q. Are we to assume from that, that there also could have been many other causes of the loss of her hair?

A. Not that I could gather from the history or reading the other transcripts.

Q. Well, doctor, you found, in your examination of her, that there was a condition of alopecia areata in the pubic area. Did you not? A. Yes.

Q. And, from the history that you had and from reading the depositions of the treating doctors, you found that that condition of a sparsity of hair in the pubic area existed at the same time that she had the loss of hair in the scalp. Did you not?

Mr. Lanier: Objected to, if the Court please, as a mis-statement again of the testimony. There is no such examination found until the first time in six months after the original loss of hair.

Mr. Bradish: Your Honor, I asked this doctor if he found that from his examination of the depositions.

The Court: He may answer.

A. At what time of the period?

(Testimony of Dr. Harry Levitt.)

Q. At the time she went to Dr. Martin—and in [62] his examination—in his deposition—did you determine that there was a condition of loss of hair, as diagnosed by them, in the pubic area at that time? A. No.

Q. When is it doctor that you first learned, from the history or the depositions of these other doctors, that this girl first noticed any loss of hair in the pubic area?

A. When Dr. Melton examined her.

Q. When Dr. Melton——

A. That was the dermatologist.

Q. I see. As a matter of fact, there is no indication in the report of Dr. Martin that he ever examined the pubic area at all, is there?

A. I saw no such record, but the girl was also thirteen at that time, which could have made a difference.

Q. You didn't have any history of the application of any chemical or cold wave solution in the pubic area, did you? A. No, I did not.

Q. Now, you mentioned that chemical could be anything, including water. Is that right?

A. That's right.

Q. It's correct, is it not, that certain soaps and shampoos and things contain some chemicals?

A. That is right. [63]

Q. And did you have a history from this young lady that a shampoo was applied to her hair at the time, or just before the application of this cold wave solution?

(Testimony of Dr. Harry Levitt.)

A. My history was that there was no shampoo.

Q. Well, doctor,——

The Court: Let's be sure we understand each other—before the application or after.

The Witness: After. I have no history of any shampoo afterwards.

Q. (Mr. Bradish, continuing): Do you have any history of any shampoo before? A. No.

Q. Well, doctor, if you were told that there has been testimony that the hair was shampooed on the same day as the application of the cold wave solution, and in accordance with your testimony that shampoo contains certain chemicals, would your opinion that the hair loss could have been caused by the cold wave be changed in any manner?

A. No.

Q. Well, isn't it possible, doctor, that the hair loss, if it was caused by the application of the chemical, could also have been caused by the chemical in the shampoo? [64]

A. In my experience, I have never seen any hair loss caused by shampoo.

Q. They do contain chemicals though, don't they? A. Yes.

Q. Now, I believe you said that emotional tension is the only known cause of alopecia areata.

A. That is correct.

Q. There are no other known causes, but you suspect certain other things?

A. It depends on the doctor. Personally, I believe it will prove to be the only cause of alopecia

(Testimony of Dr. Harry Levitt.)

areata. There are other people who believe that there may be other causes.

Q. Well, doctor, your diagnosis is that this young girl's condition is one of alopecia areata?

A. That is correct.

Q. And you state that emotional tension is the only known cause of alopecia areata?

A. That is correct.

Q. And that is the reason, is it not doctor, that when you dermatologists discover this condition of alopecia areata, the treatment indicated to you is generally treatment by a psychiatrist?

A. Well most of us don't send the patient to a psychiatrist, but it's advisable. [65]

Q. Well, it's advisable for this reason, is it not, doctor, that when you remove the emotional instability, you generally get a good result insofar as the alopecia areata is concerned?

A. Generally not, but at least the patient becomes able to live with this condition.

Q. Well, I thought you told Mr. Packard, that in a great many cases of alopecia areata, that the patient recovers almost a full growth of hair?

A. Most recover.

Q. Now, if this young lady had come to you in the Summer of 1955 and gave you a history of this condition, and you diagnosed it as alopecia areata at that time, would you have prescribed a course of treatment for her at that time?

A. I would have given her a shampoo or a lotion and if the family seemed particularly con-

(Testimony of Dr. Harry Levitt.)

cerned, I might have seen her in the office at intervals for—to keep them—realize that we were watching the condition. I don't think I would have given —some people give ultraviolet light, which I don't think does any good, but we give it sometimes because we are forced into it, because the patient demands we do something about this. But I don't think that it does any particular good.

Q. Well, do you think, doctor, that in the summer of 1955, [66] when this young girl's condition of alopecia areata was diagnosed, that there was no treatment that could have been given to her at that time that could have helped her condition?

A. I do not believe so.

Q. You don't believe so? A. I do not.

Mr. Bradish: That's all I have. Thank you.

Mr. Lanier: Just one or two questions, doctor.

Redirect Examination

Q. (By Mr. Lanier): There have been some considerable questions directed at you, doctor, with the obvious intention of inferring that this loss of hair condition is due to a thyroid condition in Sandra Nihill. Now, first of all, may I ask you, from your examination of this girl, from your training, observation and experience, from your reading of the case history—familiarization of the case history —do you have a medical opinion, based upon reasonable medical certainty, as to whether or not this girl is suffering from a thyroid condition? [67]

A. I do not believe she has a thyroid condition.

(Testimony of Dr. Harry Levitt.)

Q. Now, doctor, also, for the benefit of the jury, would you tell the jury why you say she has not?

Mr. Packard: I object to the form of the question because the doctor didn't say she did not have one. He said "I do not believe," I object to the form of the question, it's leading and——

Mr. Lanier: I'll reframe it, your Honor.

Q. (Mr. Lanier, resuming): Will you state the things upon which you base your opinion?

A. I don't think that she has a thyroid condition, because her weight gain or obesity is not the type usually associated with hyperthyroidism, her type of hair loss is not the type that one sees with hyperthyroidism, her protein-bound iodine test was normal, and her menstrual periods had remained basically unchanged. Usually the menstrual periods change with a hyperthyroid condition.

Q. With all of those factors being present in your opinion, doctor, is it possible for her to have a hyperthyroid condition? A. No.

Q. I believe, doctor, you also stated on cross-examination, [68] that the administration of thyroid was a standard treatment where there are loss of hair cases? A. That is correct.

Q. In looking for some possible help?

A. That's right. More or less of a tonic.

Q. I believe you also stated that in this type of case, the younger the patient, the less likelihood of regrowth? A. That is correct.

Q. Now, doctor, there has been some questions asked you also on the relative loss of hair and also

(Testimony of Dr. Harry Levitt.)

in the areas lost. Does the fact that the deposition of Dr. Martin, taken immediately and during the loss of hair, at no point discloses any loss of eyebrows or eye lashes, does that have any significance to you? A. Yes, it does.

Q. And what is the significance?

A. If, on his first examination, he did make a note of alopecia areata, or that a spotty loss of the eyebrows and eye lashes—and at thirteen, I suppose it would have been hard to judge the groin—the possibility of these two events being associated, that is I would have felt that the alopecia areata had started without regard, with no effect by the cold wave permanent at all. [69]

Q. But the fact that there is no loss of eyebrows, or testimony of loss of eyebrows or eye lashes, or pubic hair at that time, what does that lead you to?

A. Well, that leads to the assumption that the patient became upset——

Mr. Packard: Just a moment. Pardon me for interrupting. I wish to object to the question upon the ground it's assuming facts not in evidence. There isn't one iota of evidence in here that Dr. Martin examined the pubic area.

Mr. Lanier: Eliminate the pubic area in the question, doctor.

Mr. Packard: Well, there is no evidence of reference to the eyebrows or eye lashes on his examination.

The Court: As I recall——

(Testimony of Dr. Harry Levitt.)

Mr. Packard: He just looked at her hair and said she had seborrheic dermatitis, and that was it.

The Court: As I recall it, Dr. Martin said nothing about the eyebrows.

Mr. Lanier: That's exactly true, and in his case history, [70] your Honor, he only shows hair loss. His case history does not show any eyebrow loss and does not show any eye-lid loss.

The Court: It doesn't show any examination of the eyebrows.

Mr. Lanier: It would be impossible, your Honor, to examine a patient's head without also seeing and examining eyebrows and eye lashes.

Mr. Packard: Well, now——

The Court: Sustain the objection.

Q. (By Mr. Lanier): All right. Now, doctor, is there any significance to you in the examination of Dr. Melton six months later, when Dr. Melton testified "sparseness" as to the pubic area, but refers to no patchiness of the pubic area, in this thirteen year old girl—does that have any significance.

A. Again, the girl is young and the girl is developing. At this time, I don't think there is any clinical question of alopecia areata in the pubic area. Possibly when the girl was three years younger and hair doesn't develop until later, it might have been difficult to make up one's mind.

The Court: Three years younger than when, doctor?

The Witness: Than at the present time.

(Testimony of Dr. Harry Levitt.)

Q. (Mr. Lanier, resuming): Now, doctor, if the testimony should show that, as a matter of fact, there was no loss of eyebrows for the first three to four months after and during the loss of hair, would that have any significance to you?

A. It would.

Q. And would that be the significance that you are talking about by the original start of a chemical reaction developing into alopecia?

A. That is correct. Not developing in, it would be followed by.

Q. Being followed by. And you have also stated, doctor, that your reason in one of this type of cases for recommending a psychiatrist is for the purpose that the patient might learn to live with her condition? A. That is right.

Mr. Lanier: Thank you.

Recross Examination

Q. (By Mr. Packard): Doctor, now insofar as the loss of the eyebrows and [72] eye lashes is concerned, in alopecia areata, it's recognized in the medical profession that the loss of hair spreads from certain parts of the body to certain other parts of the body, isn't that correct?

A. Or it may happen all at the same time.

Q. I mean you may have a loss of a patch on the back of your head here and then you may have a loss in the pubic area and then your eye lashes will progressively follow along over a period of months or years?

(Testimony of Dr. Harry Levitt.)

A. But healing sometimes, and a new patch comes out sometimes.

Q. That's what I'm getting at. So, a person very well could have alopecia areata without their eyebrows falling out right away, or their eye lashes, isn't that correct? A. That is correct.

Q. And that's why apparently they call these conditions, they go from "areata" to "totalis" to "universalis" because that's the spreading, or it's getting more and more loss of hair?

A. That is correct.

Q. And insofar as the clinical findings—and I say that insofar as sensitivity, irritation, so forth—there is no evidence through any of the histories here that there was any chemical reaction to the scalp or the skin from any application? [73]

A. In the average reaction to cold wave solution, unless there has been spilling to the scalp, the scalp is not involved.

Q. Well there wasn't any evidence in this case that the scalp was involved in any manner from a chemical reaction, was there?

A. Except in the first examination of Dr. Martin, who discussed the scalp was slightly red and scaley. Other than that I could find no evidence at all.

Q. That's right, that's the only evidence, but assuming that the plaintiff, herself, stated that there was no burning sensation at the time of the application, after the application then you wouldn't ex-

(Testimony of Dr. Harry Levitt.)

pect there would be any chemical reaction, isn't that correct?

A. Depending on the severity.

Q. But ordinarily if there is a severe chemical reaction, the patient would get a stinging sensation, isn't that correct?

A. If the solution is on the scalp.

Q. That's what I mean.

Mr. Packard: Thank you.

Mr. Bradish: No questions.

Mr. Lanier: No further questions, your Honor.

(Witness excused.) [74]

The Court: It's now twelve o'clock. I suppose we will recess until two p.m. You may separate and go your separate ways, don't talk to each other or anybody else about the evidence in this case until you've heard all of the case, and don't permit anybody to talk to you about it. Be back ready for further procedure at two p.m.

(Whereupon, at 12:00 o'clock noon, the hearing was adjourned until 2:00 o'clock p.m.) [75]

Afternoon Session

Whereupon, at 2:05 o'clock p.m., April 10, 1958, the hearing in the within cause was resumed pursuant to the noon recess heretofore taken, and the following proceedings were had in open Court:

The Court: Did you conclude with the witness?

Mr. Lanier: We just finished the medical with Dr. Levitt, your Honor.

The Court: Call your next witness.

Mr. Lanier: May it please the Court, I would like at this time, to call Mrs. John Nihill.

Whereupon,

MRS. JOHN W. NIHILL

called as a witness on behalf of the plaintiff, after being first duly sworn by the clerk, in answer to questions propounded, testified as follows, to-wit:

The Clerk: What is your name?

The Witness: Mrs. John W. Nihill. [76]

The Clerk: Thank you.

Direct Examination

Mr. Lanier: Mrs. Nihill, every one has to hear your testimony, so will you try to speak right up so they can hear it.

Q. (By Mr. Lanier): Would you state your full name, please? A. Mrs. John W. Nihill.

Q. Where do you live, Mrs. Nihill?

A. Four and a half miles northeast of Kensal.

Q. In North Dakota? A. Yes, sir.

Q. And Sandra Nihill is your daughter?

A. Yes, sir.

Q. And where is your husband, Mr. Nihill, now?

A. At Kensal, North Dakota, trying to put the crop in.

Q. Calling your attention to the years prior to February 5, 1955, and that is before Sandra had the incident about which this lawsuit is, would you tell me generally the condition of her health?

A. Sandra has always been a very healthy girl.

Q. Did she have any difficulties at all with her skin? A. No.

(Testimony of Mrs. John W. Nihill.)

Q. Her scalp? A. No.

Q. Or her hair? A. No. [77]

Q. Prior to February 5, 1955—before February 5, 1955? A. No, no.

Q. Now, calling your attention to February 5, 1955, did you or not have occasion to go into Kensal to the Rexall Drug Store for a purchase?

A. I did.

Q. And who went with you? A. Sandra.

Q. When you went in, what was it that Sandra wanted?

A. We went in there with the sole purpose of buying a Cara Nome pin curl home permanent.

Q. And who actually purchased it?

A. I did.

Q. How old was Sandra at the time?

A. Thirteen years old.

Q. You actually made the selection?

A. Yes, sir.

Q. Why did you select Rexall Cara Nome?

A. I have known the Rexall Drug Stores, well as long as I can practically remember, and I have known Cara Nome products and I have always felt that they were safe and reliable.

Q. Do you keep and subscribe to the Farm Journal in your home? A. Yes, sir. [78]

Q. Have you seen the ads of the Rexall, including Cara Nome pin curl waves, in those?

A. Yes, sir.

Q. Have you checked, for instance, what they have said?

(Testimony of Mrs. John W. Nihill.)

A. Well they usually advertised and I believe down at the bottom of the page it always says "The Rexall Drug Company stands behind all of its products" or something like that.

Mr. Packard: I object to this evidence on the ground that it's hearsay. The best evidence is the ads, what they say themselves, not what this witness believes they say.

Mr. Lanier: She can testify to what she has read, your Honor.

The Court: I rather think so yes. If you connect it up by bringing some advertising.

Mr. Lanier: The advertising is already in, your Honor.

The Court: Very well.

Q. (Mr. Lanier, resuming): Did you read those ads? Prior to February 5, 1955?

A. Oh, yes, I saw the Cara Nome home permanent maybe advertised for about two years.

Q. Did you or not rely upon the advertising?

A. I did. [79]

Q. Is that or not the reason you purchased Rexall Cara Nome? A. Yes, sir.

Q. Now, calling your attention to that particular date, Mrs. Nihill—Mrs. Nihill, I show you Plaintiff's Exhibit 7, and ask you whether or not you have seen that exhibit before? A. Yes, sir.

Q. And where did you first see it?

A. In the Kensal Rexall Drug Store.

Q. And where was it then?

(Testimony of Mrs. John W. Nihill.)

A. It was on the counter, he had a pile of them with his display of Cara Nome home pin curl.

Q. And what did you do with it?

A. Well I picked one up and took it home with me.

Q. And are you the person that gave Exhibit 7 to me? A. Yes, I am.

Q. All right. Now, Mrs. Nihill, I also show you plaintiff's Exhibit 28. Will you tell me where you first saw that exhibit?

A. This was in the Cara Nome permanent kit.

Q. That you purchased? A. Yes, sir.

Q. Thank you. [80]

The Court: Is that Exhibit 14, Mr. Lanier?

Mr. Lanier: One was 7, your Honor, and the other 28. The large one is 7 and the small green one is 28.

Q. (Mr. Lanier, resuming): Who paid for the kit? A. I did.

Q. Did you take it home? A. Yes, sir.

Q. When was the permanent wave itself actually applied? A. That same evening.

Q. And who, basically, applied it?

A. My neighbor, Mrs. Adaline Briss.

Q. Is Mrs. Briss the same one that's also Mrs. Jorgenson? A. She is.

Q. And were you present during the application? A. Yes, sir.

Q. Were you present when the kit was first taken apart? A. Yes, sir.

Q. Now will you tell us, inasmuch as you your-

(Testimony of Mrs. John W. Nihill.)

self can remember, what was done and what steps were taken during the permanent?

A. Well first of all you get your little dishes——

Q. I don't want to know what you get, I want to know what you saw and what you did?

A. First of all I got the dishes ready, two little [81] dishes, a towel, a quart jar and I guess that was it.

Q. All right. Now what did Sandra do?

A. Well at the beginning she didn't do anything but just sit around, but then Mrs. Briss read the directions——

Q. Now prior to that had Sandra shampooed her hair or not?

A. Oh, yes, Sandra had shampooed her hair, yes.

Q. Do you know about how long before that?

A. Well I couldn't exactly say how long, but——

Q. At least that was completed?

A. Yes, it was.

Q. All right. Now what did you do?

A. You mean when we started to give the permanent?

Q. When you started.

A. Well after we had gathered these things together why we—well, see, first Mrs. Briss opened the kit, then she read the directions and then she read them aloud and Sandra read them and I read them.

Q. You all three read them? A. Yes, sir.

Q. Did you become thoroughly familiar with them? A. Yes, sir.

(Testimony of Mrs. John W. Nihill.)

Q. All right. Now what was done?

A. Sandra—I gave her a chair and had her sit down and we put the towel around her shoulders and the bottle of the pin curl solution was opened.

Q. By whom? A. Mrs. Briss.

Q. Was it a sealed bottle? A. Yes it was.

Q. Did you see her open it? A. Yes, sir.

Q. Did you see her break the seal?

A. Yes, sir.

Q. All right. What did you do next?

A. Half of that was poured into the dish, and the other half was left in the bottle and the seal was put on.

Q. Was that the pin curl lotion?

A. That is the pin curl lotion.

Q. And you put half of it in the dish?

A. Yes, sir.

Q. All right. What happened next?

A. I forgot, first we put the pin curls up.

Q. Who did that? A. Mrs. Briss.

Q. All right.

A. And then we opened the bottle.

Q. All right.

A. Then she took cotton and saturated all the pin curls on the head with this pin curl solution.

Q. Mrs. Briss did that?

A. Yes, sir. [83]

Q. How long did you leave that on?

A. We left that on ten minutes.

Q. Is that according to the directions?

A. It is.

(Testimony of Mrs. John W. Nihill.)

Q. What did you do next?

A. While we were waiting for the ten minutes to pass, we mixed the neutralizer.

Q. How did you mix that?

A. You take this powder and mix it with one quart of water.

Q. What did you mix that in?

A. A quart jar.

Q. Which you already testified you made available there? A. Yes.

Q. Was that during this ten minutes now, that the first half of the lotion is on?

A. Yes.

Q. All right. What did you do next?

A. Then when the ten minutes were up we took a clean dish and poured the other half of the solution in the dish and saturated all the curls again with the pin curl solution.

Q. Was that according to the directions?

A. Yes, sir.

Q. And how long did you leave that—— [84]

Mr. Packard: If the Court please, that is a conclusion——

The Court: I think so. Objection sustained. The jury will disregard the last question and answer.

Q. (Mr. Lanier, resuming): All right, your Honor. You poured out the remaining half of the pin curl lotion into a dish and then you took the cotton and re-dobbed the remaining half of that, is that correct? A. Yes.

(Testimony of Mrs. John W. Nihill.)

Mr. Packard: I object. The question is leading and suggesting——

Mr. Lanier: Well, I am only repeating, your Honor.

Mr. Packard: You don't have to repeat, the evidence will stand in the record.

The Court: I think that's true, Mr. Lanier.

Mr. Lanier: All right.

The Court: May I ask the witness, you testified something about the use of the neutralizer. Did you mix that with the lotion or how was that used? [85]

The Witness: You mix that with water in the quart jar.

The Court: All right. Then what did you do?

The Witness: Set it to one side.

The Court: All right.

Q. (Mr. Lanier, resuming): Just so we have the record straight on this, Mrs. Nihill, will you tell me now what you did with the second half of the pin curl lotion?

A. Well we took it and saturated the hair, all the curls again.

Q. With what?

A. With this pin curl solution.

Q. And how did you saturate it, what did you use? A. A piece of cotton.

Q. All right. Now how long did you leave that?

A. Ten minutes.

Q. What did you do then?

A. Then you make your test curl.

Q. What did you do, what was done?

(Testimony of Mrs. John W. Nihill.)

A. Mrs. Briss made the test curl. She unrolled one at the back of the neck, one that had been put up on the plastic curlers because they say that is the hardest part of the hair to curl. [86]

Q. Did she make that test curl?

A. Yes, she did.

Q. Did you see her do it? A. Yes, sir.

Q. Was it apparently satisfactory?

A. It was.

Q. What did you do next?

A. Then she, oh I had—oh, then she put a net on the hair and rinsed it with water.

Q. Rinsed it with water? A. Yes.

Q. What did she do next?

A. Then she took and saturated each one of the —first, she poured half of the neutralizer in a bowl, then she took this cotton and saturated each of the pin curls again.

Q. Now, she took the neutralizer solution then and saturated it with cotton with each curl? Is that correct? A. Yes.

Q. That was one-half of it?

A. That was one-half.

Q. All right, when she had that all saturated with one-half of the solution, what did she do?

A. She waited, let's see, I think it was five minutes.

Q. What did she do then?

A. Then she took the other half of the solution and put it in another dish and repeated the same thing. [87]

(Testimony of Mrs. John W. Nihill.)

Q. And then what did she do?

A. Well then she——

Q. In the meantime when this solution was going on her hair, Mrs. Nihill, was it being caught in anything or not?

A. Yes, Sandra had her head down and she was dobbing it like this (witness demonstrates) over the sink, and she had a towel protecting her eyes.

Q. Did she have a bowl or anything in the sink catching it? A. Yes, she did.

The Court: By the solution you mean what?

The Witness: The neutralizer. Maybe I should say neutralizer.

The Court: Specify what solution you are talking about so we will know.

The Witness: Well they said solution in that so many times.

The Court: Yes. Proceed.

Q. (Mr. Lanier, resuming): This is the neutralizer now. And then when you did that the second time and caught it in the bowl, what did you do then?

A. Then she poured the rest of the neutralizer over the head and then she dobbed it and left it to dry dry. [88]

Q. All right. Then what did she do?

A. Then when it was dry why she took out the bobby pins, or first she washed—let's see, yes after the neutralizer she washed it and then she took out the bobby pins, after it was dry, and then she washed it, oh, I'm getting all mixed up.